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TRANSCRIPT OF RECORD

Supreme Court of the United States

~~OCTOBER TERM, 1869.~~

No. 100

**THE ORDER OF RAILROAD TELEGRAPHERS,
ETC., ET AL., PETITIONERS,**

vs.

**CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, a corporation.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**APPROVED AND CERTIFIED JAMES A. FAY,
CLERK OF THE COURT, OCTOBER 12, 1869.**

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APPENDIX.**DOCKET ENTRIES.**

- 8-20-58 Filed Verified Complaint.
- 8-20-58 Filed Motion for Temporary Restraining Order.
- 8-20-58 Entered Temporary Restraining Order against defendants until August 25, 1958.
- 8-20-58 Plaintiff's Bond filed and approved.
- 8-22-58 Filed Verified Amendment to Complaint.
- 8-22-58 Temporary Restraining Order continued on court's own motion until August 28, 1958.
- 8-25-58 Order entered giving plaintiff leave to amend complaint by changing jurisdictional amount to \$10,000.
- 8-25-58 Defendants' Bond filed and approved.
- 8-25-58 Defendants' Answers to Complaint and Amendment to Complaint filed.
- 8-25-58 through Trial dates before Judge J. Sam Perry.
- 8-27-58
- 8-27-58 Temporary Restraining Order continued to September 6, 1958.
- 9- 5-58 Final arguments heard by court.
- 9- 5-58 Opinion of Court; Temporary Restraining Order continued in effect until September 19, 1958.
- 9- 8-58 Entry of Findings of Fact and Conclusions of Law.
- 9- 8-58 Decree—Defendants enjoined until midnight 9-19-58, plaintiff denied injunctive relief beyond that date and complaint dismissed except as to the relief granted.

Docket Entries.

- 9- 8-58 Court refuses to enter proposed findings and conclusions submitted by plaintiff at request of court.
- 9- 8-58 Entry of Injunction pending determination of plaintiff's appeal.
- 9- 9-58 Filed Bond as security pending determination of appeal in the amount of \$50,000.
- 9- 9-58 Defendants' Notice of Appeal filed.
- 9-10-58 Defendants' Amended Notice of Appeal filed.
- 9-12-58 Order vacating portion of defendants' appeal and vacating injunction pending appeal.
- 9-16-58 Notice of Plaintiff's Appeal filed.
- 9-16-58 Entry of injunction pending determination of plaintiff's appeal.
- 9-16-58 Second Amended Notice of Defendants' Appeal filed.

PREFIX TO RECORD.

This action was commenced on August 20, 1958 by the plaintiff, Chicago and North Western Railway Company, against The Order of Railroad Telegraphers, a voluntary association; James W. Whitehouse, Vice President of said association; Robert C. Williamson, General Chairman of said association; J. M. Jenks, General Secretary and Treasurer of said association; Renel C. Robertson, Thorwald Larsen and Lawrence W. Nelson, Local Chairmen of said association. On application of plaintiff, a temporary restraining order was entered on August 20, 1958 and continued thereafter from time to time during the proceedings. Evidence was taken on August 25, 26 and 27, 1958 and oral arguments heard on September 5, 1958. On September 8, 1958, after further hearing, the court entered its Findings of Fact and Conclusions of Law and Decree dismissing the complaint and denying all relief except for an injunction prohibiting defendants from striking until after September 19, 1958. On September 16, 1958 the court enjoined defendants from striking until after determination of plaintiff's appeal to this court.

Plaintiff and defendants appealed on September 16, 1958.

*Verified Complaint.*IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois,
Eastern Division.

Chicago and North Western Railway Company, a corporation,

*Plaintiff,**vs.*

The Order of Railroad Telegraphers, a voluntary association; James W. Whitehouse, Vice President of said association; Robert C. Williamson, General Chairman of said association; J. M. Jenks, General Secretary and Treasurer of said association; Reuel C. Robertson, Thorwald Larsen and Lawrence W. Nelson, Local Chairmen of said association,

*Defendants.*Civil Action
No. 58-C-1538
Equitable Relief
Demanded.

VERIFIED COMPLAINT.

Plaintiff, Chicago and North Western Railway Company, a corporation, for its complaint against defendants says:

1. This is an action for injunction to restrain and enjoin the calling and carrying out of a wrongful and unlawful strike or work stoppage on plaintiff's railroad. The wrongful acts and unlawful strike threatened by the defendants, as hereinafter described, are designed to interrupt commerce and the operation of plaintiff's railroad transportation system, and, if accomplished, will cause damages to plaintiff in excess of \$300,000 in operating revenues each day of the continuance thereof.

2. The jurisdiction of this Court attaches under the Constitution and laws of the United States regulating interstate commerce and the Fifth Amendment to the Constitution of the United States, and is specifically invoked under the Acts of June 25, 1948 (28 U. S. C., Secs. 1331 and 1337); The Railway Labor Act (45 U. S. C., Sec. 1, et seq.); and The Interstate Commerce Act (49 U. S. C. A., Sec. 1 et seq.). The amount in controversy exceeds the sum of \$10,000.00 exclusive of interest and costs. Each of the persons named herein as defendant resides in and is a citizen of the Northern District of Illinois.

3. Plaintiff, Chicago and North Western Railway Company, is a corporation duly organized and existing under the laws of the State of Wisconsin, with its principal place of business at 400 W. Madison Street, Chicago, Illinois.

4. Plaintiff is a common carrier engaged in interstate commerce by railroad, and is a "carrier" within the meaning of that term as defined in the Railway Labor Act, and is subject to the provisions of the Railway Labor Act and the Interstate Commerce Act. Plaintiff owns and operates a railroad system of over 9,000 miles servicing the nine states of Illinois, Wisconsin, Iowa, Minnesota, Michigan, Nebraska, South Dakota, North Dakota and Wyoming. Plaintiff's railroad system is an integral part of the nationwide railway system of the United States, and connects and interchanges freight and passengers with numerous other railroads at many points. Plaintiff carries millions of pieces of mail for the United States of America, and continually transports members of the United States military personnel and materials essential to our national defense. Plaintiff serves thousands of industrial plants and business enterprises and transports about one million tons of freight a week and well over 80,000 passengers a day. It employs approximately 18,000 per-

Verified Complaint.

sons and has an investment in its physical properties of about \$475,000,000.

5. Defendant, The Order of Railroad Telegraphers, is a voluntary, unincorporated association and a labor organization which is the duly recognized, certified and acting collective bargaining agent pursuant to the Railway Labor Act for the class of employees working on plaintiff's railroad which is indicated in the title of said organization. Certain individual defendants sued herein are officers of said Association for plaintiff's employees, as indicated in the caption of this complaint. The Order of Railroad Telegraphers and each individual defendant is sued herein ~~individually and as representative of the class of employees represented by said Association.~~ The members of said Association are too numerous to be made individual defendants herein, and it is impractical to bring them before this Court. The persons and organization named as defendants herein, and each of them, have a joint and common interest with, and can, and do, fairly and adequately represent all of the plaintiff's employees in the class of employees for which they are the bargaining agent.

6. Approximately one hundred years ago when the horse and wagon on dirt roads was the common mode of transportation railroad stations were established on the Chicago and North Western Railway System about seven to ten miles apart. The advent of trucks, automobiles, airplanes, barges, pipe lines and modern roads reduced the amount of passenger and freight traffic by railroad and reduced the volume of work performed at many of said stations to the extent in some cases of less than one hour a day during a normal eight-hour day. Pursuant to its duty to provide efficient and economical service to the public, the plaintiff, beginning in November of 1957, filed petitions with the Public Utilities Commissions of South Dakota, Minnesota, Iowa and Wisconsin to institute a Central

Agency Plan whereby certain stations would be made central agencies, which would extend the territories of agents who otherwise have little to do. There were numerous hearings on said petitions and defendants appeared and were represented by counsel at said proceedings.

7. On May 9, 1958, the Public Utilities Commission of South Dakota ordered plaintiff to put the Central Agency Plan into effect in South Dakota and on August 11, 1958, the Iowa State Commerce Commission ordered plaintiff to put the Central Agency Plan into effect in Iowa forthwith. The Central Agency Plan is now in effect in South Dakota and Iowa in accordance with said orders. Defendants have appealed from the order of the Public Utilities Commission of South Dakota. Hearings on plaintiff's petitions in Minnesota and Wisconsin have been concluded and the matters are under advisement by the Commissions in those states.

8. The uninterrupted services of the employees who are members of the defendant organization or represented by them are essential to the operation of the plaintiff railroad, and a strike or work stoppage on plaintiff railroad will cause and continue to cause the plaintiff many thousands of dollars of damage daily, will cause plaintiff to lay off several thousand employees who are not involved in any dispute with plaintiff or represented by the Order of Railroad Telegraphers, and will cause serious, substantial and irreparable damage and interference to plaintiff, to the many industries and railroads served by plaintiff and their employees and customers, to interstate and intrastate commerce, to the carriage of the mails, the national welfare, the public, the Government of the United States and its Armed Forces, and to perishable foodstuffs necessarily carried on plaintiff's railroad.

9. In disregard of the remedies which are available to defendants before the Public Utilities Commission of South Dakota and the Iowa State Commerce Commission and the

Verified Complaint.

right to appeal from the orders of said Commissions, and in disregard of the remedies which are available to defendants before the National Railroad Adjustment Board under the provisions of the Railway Labor Act, the defendants will engage in a strike and work stoppage on the Chicago and North Western Railway Company, the effect of which will stop all of plaintiff's train movements, paralyze plaintiff's transportation system, interrupt interstate and intra-state commerce and plaintiff's operations therein, and prevent the transportation of persons and property by plaintiff both interstate and intrastate. The purpose of said strike and work stoppage and such use of defendants' economic power is to compel plaintiff to repudiate the lawful orders of the said South Dakota and Iowa Commissions and to thereby render said orders null and of no effect, notwithstanding the peaceful and orderly remedies available to defendants under the statutes of the States of South Dakota and Iowa and the Railway Labor Act. A "protest" strike is unlawful and illegal. Plaintiff is without adequate remedy at law and is required to resort to injunctive process to prevent irreparable damage and to maintain the free flow of commerce.

10. Defendants have taken the position, which is denied by plaintiff, that their collective bargaining agreements entered into pursuant to the Railway Labor Act prevent the establishment of the Central Agency Plan and that, for example, any agent whose territory is extended must be paid more than eight hours' wages for each day, even though he may actually work only a mere fraction of that time. Plaintiff has duly performed all the terms and conditions contained in its collective bargaining agreements with the defendants on its part to be performed and will continue to do so. The Railway Labor Act makes it mandatory that such contract disputes be handled by the orderly process there described: first, the labor organization must

handle its grievance with the officers of the railroad in the usual manner and then finally the matter is submitted to the National Railroad Adjustment Board. Defendants have wholly failed to handle their grievance in the manner required by the Railway Labor Act and therefore have no right to strike under the Act. An interruption of commerce or an interruption of the operation of plaintiff's railroad as the result of a work stoppage or strike by defendants before the procedures required by the Railway Labor Act have been exhausted constitutes a violation of the public policy of the United States and the purpose of the Railway Labor Act that railroads and their employees shall exert every reasonable effort to settle all disputes or grievances growing out of the application or interpretation of collective bargaining agreements according to the mandatory procedures set forth in the Railway Labor Act in order "to avoid any interruption to commerce or to the operation of any carrier engaged therein."

11. Subsequent to the filing of the petition with the Public Utilities Commission of South Dakota and subsequent to defendant's maintaining that the Central Agency Plan was not feasible under the collective bargaining agreements above referred to, defendants attempted to change the basic nature of the contract dispute by filing a purported Section 6 notice for a new contract on the same subject. A tardy change in position cannot convert a minor contract dispute into a fully processed major dispute, and defendants cannot thus circumvent the requirements of the Railway Labor Act and deny the public those safeguards against interruptions of service, the establishment of which was the major purpose of the Act. The purported Section 6 notice clearly concerns the same fundamental problem raised by the contract dispute.

12. Defendants on December 23, 1957 requested plaintiff to agree that: "No position in existence on December 3,

1957; will be abolished or discontinued except by agreement between the carrier and the organization." Such a contract would, of course, enable defendants to require the continuation of a station agent even though a state commission had ordered his removal or a change in the number of stations handled by him, and even though the Interstate Commerce Commission had ordered the line abandoned. As there is no termination date on railroad labor contracts, this would freeze for all time the number of station agents and telegraphers regardless of need, technological changes or business conditions.

This request by defendants does not constitute a labor dispute under the Railway Labor Act and is not bargainable. Second, each state in which plaintiff operates has by statute specifically given to its public utility commission the exclusive power to determine whether station agencies may be discontinued. Private parties cannot thwart the power of the public utility commission simply by entering into a contract. Third, the Interstate Commerce Act has imposed certain duties on common carriers to the public which cannot be contracted away.

Under the National Transportation Policy Congress has required common carriers to effect "economical and efficient service" and to "foster sound economic conditions in transportation". Under Section 1(4) of the Interstate Commerce Act the railroads must "provide and furnish transportation upon reasonable requests therefor" and "establish reasonable through routes with other carriers" and also must "provide reasonable facilities for operating such routes". Under Section 1(6) it is the duty of the railroads to "establish, observe, and enforce * * * just and reasonable * * * practices affecting * * * the issuance * * * of receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation * * * and all

other matters relating to or connected with the receiving, handling, transporting, storing and delivering of property." Under Section 1(8) it is the duty of railroads to construct, maintain and operate switch connections with shippers and other railroads, and under Section 1(11) "to furnish safe and adequate car service". The plaintiff will preclude its ability to perform these mandatory duties if it freezes the number of its employees and enters into the contract sought by defendants.

13. On August 18, 1958, the National Mediation Board took jurisdiction and began mediation on August 19 under Docket E175. Under the Railway Labor Act no strike may be engaged in during mediation or during the mandatory 30-day cooling off period following the end of mediation under Section 155 thereof. Defendants have, however, notwithstanding this, given notice that they will begin striking at 6:00 A. M. on August 21, 1958. This will completely paralyze all operations of the plaintiff.

14. Plaintiff has performed all of its obligations under the Railway Labor Act and stands ready to continue to do so.

15. No injury will be done to defendants by the granting of the relief here prayed for because of the matters and things heretofore set forth, as defendants, by pursuing and utilizing the processes set up by law will receive an impartial, final and binding determination concerning the order of the state commissions and the contractual dispute in the manner and form provided by law.

16. This controversy does not involve a labor dispute within the meaning of that term as used in the Norris-LaGuardia Act (29 U. S. C. A. Sec. 101 et seq.) and in any event the threatened acts are unlawful and in violation and defiance of the Railway Labor Act and the other laws hereinbefore mentioned.

17. Said wrongful and unlawful acts of defendants have

and will continue to cause substantial and serious damage to plaintiff in loss of revenues, in unproductive labor costs, in liability for loss and damage claims resulting from delayed and spoiled shipments, and other necessary expenditures incurred by plaintiff during the period of strike and work stoppage, all in excess of \$100,000; and in addition thereto intangible but irreparable damages not capable of measurement.

Wherefore, plaintiff prays that the Court issue a temporary restraining order and preliminary injunction and, ultimately, a permanent injunction in and by which defendants, and members of defendants' organization and all employees of plaintiff whom the defendants represent, and all persons acting in concert or participating with them shall be restrained and enjoined from causing, ordering, authorizing, encouraging, inducing, approving, continuing, starting or permitting any strike, work stoppage or slowdown on plaintiff's railroad; picketing or bannerizing any of the premises on which plaintiff conducts its railroad operations; interfering with ingress to or egress from said premises; interfering in any manner with the delivery, loading, unloading, dispatch or movement of any of plaintiff's rolling stock, engines, cars, equipment or trains or any of the contents thereof; in any manner interfering with or inducing or endeavoring to induce any person employed by plaintiff from performing his work and duties and from in any manner endeavoring to induce any such employee to desist therefrom in whole or in part; and directing defendants and members of defendant organization and all persons acting in concert or participating with them to take all steps within their power to prevent said threatened strike from occurring or from continuing if commenced. Plaintiff further prays that the Court enter judgment in favor of plaintiff and against the defendants and each of them in the sum of \$100,000 or such other sum as

may be proven, together with interest and costs, and plaintiff further prays for such other and further relief as in equity and in good conscience the Court may deem proper.

Carl McGowan,
Fred O. Steadry,
Edgar Vanneman, Jr.,
R. W. Russell,

Attorneys for Plaintiff.

400 West Madison Street,
Room 1422,
Chicago 6, Illinois,
DE 2-2121.

Affidavit.

State of Illinois, { ss.
County of Cook. }

R. W. Heron, being first duly sworn, on oath deposes and says that he is General Superintendent-Transportation of the Chicago and North Western Railway Company, plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the facts stated therein are true to the best of his knowledge and belief.

R. W. Heron.

Subscribed and sworn to before me this 20th day of August, 1958.

(Seal)

J. E. Krueger,

Notary Public.

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—58-C-1538) • •

**TEMPORARY RESTRAINING ORDER, NOTICE AND
ORDER TO SHOW CAUSE.**

It appearing to the court from the verified complaint herein that a temporary restraining order, preliminary to a hearing on a motion for an injunction, should issue without further notice because defendants and the members of the organization represented by them will strike unless restrained by immediate order of this Court, that immediate and irreparable injury, loss and damage in that event will result to plaintiff and others before notice can be served and hearing had on plaintiff's motion for an injunction;

Now, Therefore, It Is Ordered, That defendants, members of the Order of Railroad Telegraphers, and their agents, servants, employees, officers and attorneys, and all persons employed by plaintiff on its railroad, and any persons acting in concert or participating with them, and any and all persons acting by, with, through or under them or by or through their order, be and they are hereby restrained until the 25th day of August, 1958, at 6:00 o'clock P.M., Central Daylight Saving Time, unless this order be extended beyond said time or dissolved prior thereto from:

1. Calling, ordering, authorizing, encouraging, inducing, approving, continuing, starting or permitting any strike or work stoppage on plaintiff's railroad.

It Is Further Ordered that said defendants, and each of them, take all steps within their power to prevent said threatened strike, work stoppage or slow-down and its continuance if commenced;

It Is Further Ordered that defendants, and each of them, appear before this Court in the United States Court House in the City of Chicago, Illinois, on August 25, 1958, at

11 o'clock A.M., Central Daylight Saving Time, and show cause, if any they have, as to why this restraining order should not be continued or made permanent in accordance with the prayers of the complaint heretofore filed;

It Is Further Ordered that a copy of this notice and order, and a copy of the complaint, be served by F. M. Ellis, K. F. Bourne, J. C. Collins, W. J. Fitzgerald, L. N. Smallwood or by the U. S. Marshal on the defendants forthwith;

And It Is Further Ordered that copies of this notice and order be posted as promptly as may be on the bulletin board at each principal office on plaintiff's railroad system.

This order issued at 3:30 P. M. o'clock, this 20th day of August, 1958.

J. S. Perry,

United States District Judge.

Chicago, Illinois.

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—58-C-1538) • •

ORDER.

The Court, upon its own motion, and for the purpose of preventing chaos and resulting inconvenience to plaintiffs, defendants and the general public, because of impending arrangements for a proposed strike, does hereby extend the terms and conditions of the restraining order entered herein on August 19, 1958, until 7:00 o'clock A.M. August 28, 1958, in the same manner as if set forth haec verba herein, without prejudice to hearing set herein at 11:00 A.M.

August 25, 1958.

Enter:

Joseph Sam Perry,

Judge.

Dated: August 22, 1958.

Amendment to Complaint.

IN THE UNITED STATES DISTRICT COURT.

(Caption—58-C-1538)

AMENDMENT TO COMPLAINT.

Pursuant to Rule 15A of the Rules of Civil Procedure, plaintiff herewith files the following amendment to its complaint herein:

12a. By the National Agreement, dated November 1, 1956, between the defendant Brotherhood and the plaintiff and other railroads, the Brotherhood is barred, during the life of that agreement (which remains in effect until October 31, 1959), from presenting a request for a contract provision of the character requested by the defendants. Plaintiff's position in this regard has been communicated to the defendants, and the resulting dispute as to the proper interpretation of the moratorium provisions of the National Agreement has now been submitted by plaintiff to the National Railroad Adjustment Board, the agency which by law has exclusive jurisdiction to determine the issue. The identical issue has also been submitted to said Board by another carrier in another proceeding before the Adjustment Board. Defendants therefore cannot now legally strike over a contract dispute which is before said Board. Defendants' proposal, even if bargainable, is thus barred by the said Agreement of November 1, 1956, and this question has been submitted to the National Railroad Adjustment Board.

12b. The plaintiff entered into an agreement with practically all of the other non-operating brotherhoods on December 27, 1956, providing for supplemental unemployment benefits. The same agreement has been offered the defendant, O. R. T., but has been refused by the O. R. T. Plaintiff hereby reaffirms the availability to the O. R. T. of this

agreement, which has been accepted by brotherhoods which have been much more adversely affected than the O. R. T. by the necessary steps taken by plaintiff to adjust its working forces to the existing service needs.

Carl McGowan,
Fred O. Steadry,
Edgar Vanneman, Jr.,
R. W. Russell,
Attorneys for Plaintiff.

400 West Madison Street,
Room 1422,
Chicago 6, Illinois.
DE 2-2121

Affidavit.

State of Illinois, } ss.
County of Cook. }

R. W. Heron, being first duly sworn, on oath deposes and says that he is General Superintendent-Transportation of the Chicago and North Western Railway Company, plaintiff; that he has read the foregoing Amendment to Complaint and knows the contents thereof, and that the facts stated therein are true to the best of his knowledge and belief.

R. W. Heron.

Subscribed And Sworn to before me this 22nd day of August, 1958.

(Seal)

J. E. Krueger,

Notary Public.

Mailing Affidavit.

State of Illinois, }
County of Cook. } ss.

I, Mary P. Boylen, being first duly sworn, on oath state that I have this 22nd day of August, 1958; mailed a copy of the above Amendment to Complaint by placing a copy thereof in an envelope, with proper postage affixed, addressed to:

Mr. Alex Elson,

Mr. Lester P. Schoene,
Suite 3400—11 South LaSalle Street,
Chicago 3, Illinois;

Mr. James W. Whitehouse,
1205 Judson Avenue,
Evanston, Illinois;

Mr. Robert C. Williamson, and J. M. Jenks,
Room 1703—400 West Madison Street,
Chicago 6, Illinois;

Mr. Reuel C. Robertson,
2694 Joseph Avenue,
Des Plaines, Illinois;

Mr. Thorwald Larsen,
696 Thacker Street,
Des Plaines, Illinois;

Mr. Lawrence W. Nelson,
c/o Chicago and North Western Railway Company,
Nelson, Illinois;

in the United States mail chute located at 400 West Madison Street, Chicago, Illinois.

Mary P. Boylen.

Subscribed And Sworn to before me this 22nd day of August, 1958.

J. E. Krueger,

(Seal)

Notary Public.

IN THE UNITED STATES DISTRICT COURT.

(Caption 58-C-1538)

ANSWER OF DEFENDANTS.

Now come The Order of Railroad Telegraphers (hereinafter referred to as "Telegraphers"), James W. Whitehouse, Robert C. Williamson, J. M. Jenks, Reuel C. Robertson, Thorwald Larsen and Lawrence W. Nelson, sued individually and as representatives of the class of employees represented by the Telegraphers, by their attorneys, Alex Elson and Schoene and Kramer, and in answer to the Complaint state:

First Defense.

1. The Complaint fails to state a claim upon which relief can be granted.

Second Defense.

1. This Court is without jurisdiction to grant injunctive relief under the provisions of the Norris-LaGuardia Act (29 U. S. C. Sec. 101 et seq.).

Third Defense.

1. The plaintiff by refusing to negotiate in good faith with the defendant Telegraphers with reference to proposed change in the agreement, notice of which was served upon the plaintiff by the defendant Telegraphers pursuant to Section 6 of the Railway Labor Act (45 U. S. C. Sec. 156), has violated the mandatory requirements of Section 2, First, of the Railway Labor Act (45 U. S. C. Sec. 152, First) in that it has refused to exert every reasonable effort to make or maintain agreements concerning rates

of pay, rules, and working conditions and to settle all disputes in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof and by reason of this unlawful conduct and other conduct described hereinafter in this Answer, is not entitled to any relief from a court of equity.

Fourth Defense.

Defendants answer the Complaint as follows:

1. Defendants admit that this is an action for an injunction. Defendants deny all the remaining allegations of paragraph 1 of the Complaint.
2. Defendants deny the allegations of paragraph 2.
3. Defendants admit the allegations of paragraph 3.
4. Defendants admit that plaintiff is a common carrier engaged in interstate commerce by railroad, and is a "carrier" within the meaning of that term as defined in the Railway Labor Act and is subject to the provisions of the Railway Labor Act and the Interstate Commerce Act. Defendants neither admit nor deny the remaining averments of paragraph 4 and state that they do not have sufficient knowledge of such allegations upon which to form a belief.
5. Defendants admit that the Telegraphers is a voluntary, unincorporated association and a labor organization which is the duly recognized, certified and acting collective bargaining agent pursuant to the Railway Labor Act of the class of employees who are working on plaintiff's railroad in the craft commonly described as Station, Tower and Telegraph Employees. Defendants admit that certain individual defendants sued herein are officers of the Telegraphers. Defendant Reuel C. Robertson is not now and has not been for sometime an officer of Telegraphers. The remaining allegations of paragraph 5 are denied.

6. The facts leading up to the strike which the plaintiff seeks to enjoin are set forth in paragraphs 7 to 23 of this Answer.

7. On the date of December 23, 1957 defendant Telegraphers served formal notice under provisions of Section 6 of the Railway Labor Act (45 U. S. C. Sec. 156) to amend the current agreement between the Telegraphers and plaintiff railroad by adding a rule reading "No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the organization." A copy of the said notice is hereto attached and made a part hereof as Exhibit 1.

8. Under date of December 24, 1957 plaintiff, acting by its Director of Personnel, T. M. Van Patten, by letter addressed to one of the officers⁶ of the Telegraphers, acknowledged receipt of the Section 6 notice. Plaintiff in this letter also took the position that the subject matter of the proposed rule was not a proper subject for a Section 6 notice. The letter suggested a meeting to discuss the matter on January 17, 1958 at 2:00 P. M. A copy of the letter is hereto attached and made a part hereof as Exhibit 2.

9. A meeting was had on January 17, 1958 at the hour of 2:00 P. M. by and between the Director of Personnel of the plaintiff, T. M. Van Patten, and one of the attorneys for plaintiff, and representatives of the Telegraphers. At the meeting the Director of Personnel of the plaintiff reiterated the plaintiff's position taken in the letter of December 24, 1957. The representatives of the Telegraphers took the position that the Section 6 notice was proper under the Railway Labor Act, that the subject was in fact bargainable and that a similar rule was in existence by and between the Railroad Yardmasters of America and a number of railroads. Representatives of the defendant stated that they did not regard the meeting as

one confined to a discussion of the position taken by the plaintiff and asked for a discussion of the merits of the proposal under the procedures of the Railway Labor Act. The plaintiff's representatives refused to discuss the merits of the proposal.

10. Illustrative of the agreements reached by the Railroad Yardmasters of America and referred to in the conference of January 17, 1958 is the following provision of the Mediation agreement between the Railroad Yardmasters of America and Missouri-Kansas-Texas Lines entered into on November 8, 1957:

"(3) Carrier agrees to maintain during period provided in Article III of the Agreement of May 3, 1957, the Yardmaster positions assigned as of the date of this agreement, unless business conditions justify further reductions—in which event the Carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effected."

• • • • •

11. Under date of January 21, 1958 plaintiff by its Director of Personnel, T. M. Van Patten, addressed a letter to R. B. Boyington, General Chairman for Telegraphers on the plaintiff's property, referring to the prior correspondence and the conference of January 17th restating the position of the plaintiff previously taken and denying the request for the proposed rule. A copy of this letter is attached hereto and made a part hereof as Exhibit 3.

12. Under date of January 27, 1958 Telegraphers by R. B. Boyington, its General Chairman on the plaintiff railroad, addressed a letter to the Director of Personnel, T. M. Van Patten, for the plaintiff referring to the prior correspondence of the parties restating the position taken at the conference that it was the hope of the representatives of the Telegraphers that through discussion plaintiff's representatives might be persuaded to confer with

the defendants on the merits of the proposal. The letter further stated that inasmuch as the Telegraphers had been unsuccessful in persuading the representatives of the plaintiff to change its position and to secure a conference on the Section 6 proposals of the Railway Labor Act, there was no alternative except to treat the letters of the plaintiff dated December 24, 1957 and January 21, 1958 (Exhibits 2 and 3 attached hereto) as a refusal to confer under the procedure of the Railway Labor Act and that it was the intention of the Telegraphers to progress the Section 6 proposal under the procedure of the Railway Labor Act. A copy of said letter is attached hereto and made a part hereof as Exhibit 4.

13. Under date of February 5, 1958 Telegraphers made application for the Mediation Services of the National Mediation Board. A copy of the letter to the Secretary of the Board from G. E. Leighty, President of Telegraphers, dated February 5, 1958 is attached hereto and made a part hereof as Exhibit 5. A copy of the application for mediation services is also attached hereto and made a part hereof as Exhibit 6.

14. Under date of February 10, 1958 the National Mediation Board by its Executive Secretary addressed a letter to the Director of Personnel of the plaintiff, T. M. Van Patten, advising the plaintiff of the receipt of the application for mediation and the organization's request that the attention of the plaintiff be called to the status quo provision of Section 6 of the Railway Labor Act. A copy of this letter is hereto attached and made a part hereof as Exhibit 7.

15. Under date of February 24, 1958 the National Mediation Board by its Executive Director addressed a letter to the Director of Personnel of the plaintiff, Mr. T. M. Van Patten, and to the President of the Telegraphers, G. E. Leighty, advising that the application filed

by the Telegraphers had been reviewed by the Board, advising further that the Board considered the Section 6 notice served by the organization as proper and that the Board had no alternative except to docket the application, and that the application had been docketed as Case No. A-5696. The letter also inquired whether it was the intention of the Telegraphers to have the application cover both the plaintiff and the former Chicago, St. Paul, Minneapolis and Omaha Railway Company. A copy of this letter of February 24, 1958 is hereto attached and made a part hereof as Exhibit 8. Under date of March 4, 1958 Telegraphers by its President, G. E. Leighty, addressed a letter to the Executive Secretary of the National Mediation Board acknowledging receipt of the letter of February 24th from the National Mediation Board and advising that a separate application for mediation would be filed in connection with the former Chicago, St. Paul, Minneapolis and Omaha Railway and that the Telegraphers were agreeable to having both applications handled concurrently in mediation. A copy of the letter of March 4, 1958 was forwarded to the Director of Personnel of the plaintiff under date of March 7, 1958 by the National Mediation Board. A copy of this letter is attached hereto and made a part hereof as Exhibit 9.

16. Under date of May 21, 1958 the National Mediation Board by telegram to the Director of Personnel of the plaintiff and to G. E. Leighty, President of the Telegraphers, advised that Mediator, Wallace G. Rupp, would be available to commence mediation on May 22, 1958 of Case A-5696 with reference to the rule proposed by the Telegraphers concerning abolition or discontinuance of existing positions and asking to be advised as to who would represent the parties. The Telegraphers by its President, G. E. Leighty, by telegram advised the Mediation Board on the same day that it would be represented

in the mediation proceedings by its Vice President, B. N. Kinkead. The Mediator met with the parties but was unable to persuade the representatives of the plaintiff to discuss the merits of the rule proposed by the Telegraphers and which was the subject of the Section 6 notice hereinabove referred to.

17. Under date of May 27, 1958 W. G. Rupp, the Mediator appointed by the National Mediation Board, addressed a letter to the Director of Personnel of the plaintiff, T. M. Van Patten, and to B. N. Kinkead, Vice President of Telegraphers, advising the parties that he had used his best efforts to bring about an amicable settlement in mediation but had been unsuccessful and in accordance with Section 5 First of the Railway Labor Act, the National Mediation Board requested the plaintiff and the Telegraphers to enter into an agreement to submit the dispute to arbitration as requested under Sections 7 and 8 of the Railway Labor Act. A copy of this letter is hereto attached and made a part hereof as Exhibit 10. Both parties declined arbitration. The declination of arbitration by the plaintiff is contained in a letter under date of June 12, 1958 addressed to Mediator, W. G. Rupp, by the Director of Personnel of the plaintiff railroad. A copy of this letter is hereto attached and made a part hereof as Exhibit 11.

18. Under date of June 16, 1958 the National Mediation Board by its Executive Secretary addressed a letter to the Director of Personnel of the plaintiff, T. M. Van Patten, and to G. E. Leighty, President of the Telegraphers, advising the parties that arbitration had been declined and that in the judgment of the National Mediation Board all practical methods provided in the Railway Act for the adjustment of the dispute by the National Mediation Board had been exhausted without effecting a settlement, and that notice was being served on behalf

of the National Mediation Board that its services (except as provided in Section 5 Third, and in Section 10 of the Railway Labor Act) had been terminated as of June 16, 1958 under the provisions of the Railway Labor Act. A copy of this letter is hereto attached and made a part hereof as Exhibit 12. Under date of June 20, 1958 the Telegraphers by its President, G. E. Leighty, wrote a letter to the National Mediation Board acknowledging its letter of June 16, 1958, a copy of which letter is hereto attached and made a part hereof as Exhibit 13.

19. Under date of July 10, 1958 the Telegraphers submitted to its membership on the plaintiff property a circular and strike ballot seeking the views of the membership as to whether a strike should be authorized if necessary to secure a satisfactory settlement of the dispute arising from the proposal of the Telegraphers to add to the existing agreements with the plaintiff the rule proposed under the Section 6 notice above referred to. A communication accompanying the strike ballot summarized the circumstances, which in the opinion of the officers of the Telegraphers, gave rise to the need for the rule proposed and also setting forth in chronological order certain of the events set forth above. A copy of the circular and strike ballot is hereto attached and made a part hereof as Exhibit 14.

20. A separate Section 6 notice was served on the Chicago, St. Paul, Minneapolis and Omaha Railway asking for a rule change identical with the rule change proposed in the Section 6 notice served by the Telegraphers on the plaintiff. The Chicago, St. Paul, Minneapolis and Omaha Railway Company no longer exists as an operating company, the operation of its railroad properties being carried on by the plaintiff, but the agreement between the Telegraphers and the Chicago, St. Paul, Minneapolis and Omaha Railway Company has been continued in effect by

the plaintiff and governs the relationship between the Telegraphers and the plaintiff as to employees engaged in such operations. The chronology of the handling of the Section 6 notice by the Telegraphers with the Chicago, St. Paul, Minneapolis and Omaha Railway and the actions taken by the plaintiff and the Telegraphers in connection with said notice are identical with the processing of the Section 6 notice served by the Telegraphers on the plaintiff except that the application for mediation was made under date of March 18, 1958 and the case was docketed by the National Mediation Board as Case No. A-5739. Both Case No. A-5739, and case No. A-5696 involving the dispute between the Telegraphers and the plaintiff, were processed together before the National Mediation Board.

21. The vote of the membership of Telegraphers on the strike ballot referred to above was almost unanimous in favor of a strike.

22. Under date of August 18, 1958 a strike call and instructions pertaining to conduct of strike were issued by the Telegraphers to all local chairmen, members and employees represented by the Telegraphers on the plaintiff railway and the Chicago, St. Paul, Minneapolis and Omaha Railway, being the Twin Cities Division of the Chicago North Western Railway to commence on Thursday, August 21, 1958 at 6:00 A. M. Central Standard Time. A copy of the strike call is attached hereto and made a part hereof as Exhibit 15.

23. Under date of August 18, 1958 the National Mediation Board proffered its services on an emergency basis under its emergency docket as Docket No. E 175. On August 20, 1958 by telegram addressed to the Director of Personnel of the plaintiff and to G. E. Leighty, President of the Telegraphers, the National Mediation Board advised that it was concluding its emergency effort and closing its file on Docket E 175 as of August 20, 1958. A

copy of said telegram is hereto attached and made a part hereof as Exhibit 16.

24. From the time of the service of the Section 6 notice to the present date, the plaintiff has refused to discuss with the representatives of defendant Telegraphers the merits of the proposal contained in the Section 6 notice and has at all times failed to bargain in good faith with the defendant as required by the Railway Labor Act.

25. The allegations of paragraphs 6 through 13, inclusive, of the Complaint seek to create the impression that the strike call by the Telegraphers is a strike in protest of certain actions of the Public Utilities Commission of South Dakota and the Iowa State Commerce Commission and that the strike is essentially a strike involving the interpretation or application of the existing agreements between the plaintiff and the Telegraphers, and to mask the real issue which is the failure and refusal of the plaintiff at all times to bargain in good faith with reference to the change proposed by the Telegraphers incorporated in the Section 6 notices served by the Telegraphers on the plaintiff as set forth above and which led to the issuance of the strike call. The allegations of paragraphs 6 to 13 are in the main irrelevant to the issues of this case. The facts set forth in paragraphs 6 to 13 are denied except as to such facts as may be set forth in the allegations of paragraphs 7 to 23 of this Answer and except as follows:

(a) Defendants admit that the plaintiff, beginning in November of 1957, filed petitions with the Public Utilities Commissions in South Dakota, Minnesota, Iowa and Wisconsin for the purpose of abolishing certain positions of employees represented by Telegraphers and enlarging the assignments of others. Defendants further admit that there have been numerous hearings on said petitions and that defend-

ants have been present and were represented by counsel at such hearings.

(b) The allegations of paragraph 7 of the Complaint are substantially correct although irrelevant to the issues of this case. There should be added the fact that both the South Dakota and Iowa Commission disclaimed any jurisdiction over the labor relations of the parties to the litigation and that the order in South Dakota was by divided commission.

(c) The defendants admit the allegations of paragraph 8 that the uninterrupted services of the employees who are members of the Telegraphers or represented by them are essential to the operation of the plaintiff railroad. Defendants neither admit nor deny the remaining averments of paragraph 8 and state that they do not have sufficient knowledge of such allegations to form a belief.

(d) The allegations of paragraph 9 of the Complaint constitute for the most part conclusions of the plaintiff; to the extent that they are allegations of fact they are denied.

(e) Defendants admit, as alleged in paragraph 10 of the answer, that under the collective bargaining agreement of the parties a station agent may not be required to work at more than one station in order to receive a day's pay. Defendants state further, as more fully set forth hereinabove, that the strike, which plaintiff seeks to enjoin, grows out of the failure of the plaintiff to bargain collectively with the Telegraphers and does not arise out of differences of opinion as to the meaning and application of the existing contracts between the plaintiff and Telegraphers.

(f) Defendants admit, as alleged in paragraph 13 of the Complaint, that on August 13, 1958 the National Mediation Board proffered its services on an

emergency basis docketed as E 175, and alleges that, as set forth above, the National Mediation Board terminated its emergency services on August 20, 1958. Defendants deny that the mandatory thirty-day cooling off period referred to in paragraph 13 applies in any way to the defendant but states that should the thirty-day provision have any application, the thirty-day period would have had its inception on June 16, 1958, the date on which the National Mediation Board advised the plaintiff and the Telegraphers that it was terminating its services under the provisions of the Railway Labor Act, as more fully set forth above. The services proffered by the National Mediation Board on August 18, 1958 and withdrawn on August 20, 1958 were of an emergency character and did not affect the time provisions of the Railway Labor Act.

26. Defendants deny paragraphs 14, 15, 16 and 17 of the Complaint.

Alex Elson,
Schoene and Kramer,
By Alex Elson,
One of the Attorneys for Defendants.

Alex Elson,
11 South LaSalle St.,
Chicago, Illinois,
Schoene and Kramer,
1625 K Street N. W.,
Washington, D. C.

State of Illinois, } ss.
County of Cook. }

G. E. Leighty, being first duly sworn on oath, deposes and says that he is President of the defendant Telegraphers. Affiant further states that he has read the foregoing Answer and that all of the allegations of the Answer are, true in substance and in fact, except as to paragraph 9, and as to the facts alleged in said paragraph affiant is informed and believes that the same are true and states that the same are true upon such information and belief.

G. E. Leighty.

Subscribed and sworn to before me this 23rd day of August, 1958.

Aaron S. Wolff,
Notary Public.

(seal)

Exhibit 1.

(Letterhead of The Order of Railroad Telegraphers,
Chicago 6, Illinois.)

December 23, 1957.

Mr. T. M. Van Patten,
Director of Personnel,
C. & N. W. Railway Co.,
400 W. Madison Street,
Chicago 6, Illinois.

Dear Sir:

Please accept this as a formal notice served under the provisions of the Railway Labor Act, specifically Section 6, of the desire of the General Committee of The Order of Railroad Telegraphers on the Chicago and North Western Railway Company to amend the current agreement by adding a rule reading:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

Please advise place, time, and date for initial conference.

Your attention is directed to the status quo provisions of the Railway Labor Act, Section 6.

Yours respectfully,

R. B. Boyington,
General Chairman.

RBB:HD.

Exhibit 2.

(Letterhead of Chicago and North Western Railway Company, Chicago 6, Illinois.)

December 24, 1957.

File 69-6-39.

Mr. R. B. Boyington,
1703 Daily News Building,
400 West Madison Street,
Chicago 6, Illinois.

Dear Sir:

This will acknowledge receipt of your letter of December 23, 1957 which you asked be accepted as a formal notice served under provisions of the Railway Labor Act, specifically Section 6, to amend the current agreement by adding a rule reading:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the Organization."

It is the position of the carrier that the subject matter of your letter of December 23, 1957 is not a proper subject for a Section 6 notice in that it does not in fact concern rules, rates of pay or working conditions, but instead constitutes an attempt to freeze assignments regardless of the controlling agreement and regardless of the necessity or justification for such assignments. The request therefore goes beyond rates of pay, rules or working conditions as referred to in the Railway Labor Act, but constitutes an attempt to usurp the prerogative of the management and to remove from it the control which it must of necessity have over its operations. It is therefore the position of the carrier that the notice served by you is improper and cannot properly constitute basis for a Section 6 notice.

I have, however, no objection to meeting you to further set forth my position in this matter and therefore without in any way waiving my position that your letter of December 23, 1957 is not a proper Section 6 notice, suggest that we meet to discuss the matter at 2:00 p. m., Friday, January 17, 1958. Unless I hear from you to the contrary I will assume that that time is acceptable to you.

Yours truly,

(Signed) T. M. Van Patten.

Exhibit 3.

(Letterhead of Chicago and North Western Railway Company, Chicago 6, Illinois.)

January 21, 1958.

File 69-6-39.

Mr. R. B. Boyington,
1703 Daily News Building,
Chicago 6, Illinois.

Dear Sir:

Please refer to your letter of December 23, 1957 which you asked be accepted as a formal notice served under the provisions of the Railway Labor Act, specifically Section 6, to amend the current agreement by adding a rule reading:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the Organization."

In my letter of December 24, 1957 to you I indicated that it was the position of the carrier that the subject matter of your letter was not a proper subject for a Section 6 notice in that it did not concern rules, rates of pay, or working conditions. When we discussed this matter in conference on January 17, 1958, at which time Mr. B. N. Kinkead of your organization was present, I explained

my position in this respect. My position in effect is that the proposal submitted with your letter does not in any way affect the rules, rates of pay, or working conditions under which an employe works, but is intended as a freezing action which would establish positions for all times regardless of the necessity for such positions or the work, if any, which would be performed by those positions if in existence. In other words, the proposal would not in any way affect the rules under which the employe worked, the rates of pay paid him for the service performed, or the working conditions of the employe but would require that his position be maintained for all time.

It is apparent that the requested rule contained in your letter goes far beyond the subject matter contemplated by the Railway Labor Act, and is not a proper subject for a Section 6 notice under that Act. It is therefore necessary that your request for a rule as indicated in your letter be denied in its entirety.

Yours truly,

(Signed) T. M. Van Patten.

Exhibit 4.

(Letterhead of The Order of Railroad Telegraphers.)

January 27, 1958.

Mr. T. M. Van Patten,
Director of Personnel,
C. & N. W. Railway Co.
400 W. Madison Street,
Chicago 6, Illinois.

File 69-6-39.

Dear Sir:

This will acknowledge receipt of your letter of January 21, 1958, with respect to our conference on January 17, 1958, concerning the proposal made in my letter of December 23, 1957.

You will recall that Vice President B. N. Kinkead of our organization and I made it clear at the outset that in meeting with you on the date suggested in your letter of December 24, 1957, we were not acquiescing in or accepting your position regarding the proposal as stated in that letter. Rather, we stated, that it was our hope that through discussion we could persuade you to confer with us on the merits of the proposal under the procedures of the Railway Labor Act and then proceed to hold such a conference.

Since, as was apparent in the discussion and as confirmed in your letter of January 21, 1958, we have been unsuccessful in persuading you to change your position and in securing conferences on our proposal under the Railway Labor Act we have no alternative but to treat your letters of December 24, 1957 and January 21, 1958, as a refusal to confer under the procedures of the Act.

It is our intention to progress our proposal of December 23, 1957 under the procedures of the Railway Labor Act.

Yours respectfully,

R. B. Boyington, R.C.W.

RE:HD.

General Chairman.

BCC: Mr. G. E. Leighty, President,
Mr. G. J. Schueler,
General Chairman, Div. 71
512 Fifth Street,
Hudson, Wisconsin.

Exhibit 5.

February 5, 1958

Mr. E. C. Thompson, Exec. Secretary

National Mediation Board

File: MB 356

Seventh Floor

National Rifle Association Building

1230 Sixteenth Street, N. W.

Washington 25, D. C.

Dear Sir:

I enclose in duplicate Form NMB 2 covering formal notice served by The Order of Railroad Telegraphers upon the Chicago and North Western Railway Company for an amendment to the current Agreement by the addition of a rule as set forth in the copies of the formal notice which are attached to Form NMB 2.

The notice upon the Carrier was served on December 23, 1957 and conference was held in the office of the Carrier on January 17, 1958 at which time Carrier representatives were present as were the representatives of the Organization with the Vice President, Mr. B. N. Kinkead in charge of the negotiations for the Organization. Prior to the conference the Carrier representative did, on December 24, 1957, in acknowledging receipt of the formal notice, take the position that the notice was improper under the provisions of the Railway Labor Act. The Organization disputes such to be the case. At the conference on January 17, 1958, the representatives of the Organization set forth that our position in the notice is a proper one to be served under the provisions of the Railway Labor Act and pointed out that mediation settlements have been made covering such items.

On January 21, 1958 the Carrier representative addressed

Answer.

a communication to the General Chairman of the Organization which I attach to Form NMB 2 for the information of the National Mediation Board and I likewise attach copy of the reply made by the Organization representative, the General Chairman on the property under date of January 27, 1958, for the information of the National Mediation Board.

I trust that the National Mediation Board will see fit to accept immediate jurisdiction of this dispute and if such is done I request that the Board in its advice to the Carrier call attention to the status quo provisions of Section 6 of the Railway Labor Act.

Yours very truly,

G. E. Leighty.

Enclosure

be: Mr. R. C. Williamson

NDP:em

Exhibit 6.**National Mediation Board****Application for Mediation Services****(File This Application in Duplicate)**

To the National Mediation Board, MB 356
Washington, D. C.

A dispute has arisen between the parties shown below which has not been adjusted between them, and the services of the National Mediation Board under section 5, First, of the Railway Labor Act, are hereby invoked on the specific question set forth below. The approximate number of employees involved are 1500.

The Specific Question in Dispute.
(See Item 1 on reverse side)

See attached copy of formal notice served.

(If necessary extend question on additional sheet or attach exhibit)

Parties to Dispute.

The Order of Railroad Telegraphers vs. Chicago and Northwestern Railway Company.

Working Agreement.

If an agreement governing rates of pay, rules, or working conditions is in effect, give name of parties thereto and date thereof. If there is no such agreement, so state same parties. Date of Agreement—April 1, 1950.

Compliance with Railway Labor Act.

(See Item 2 on reverse side)

1. If this dispute involves change in the above-mentioned agreement, attach copy of the 30-day notice served by party desiring change and insert date of notice here, December 23, 1957.
2. If this dispute involves the negotiation of a new or supplemental agreement, attach copy of request made by party desiring same and insert date of request here.
3. If there has been a refusal to confer, so state and give reason; otherwise, give date of last conference here, January 17, 1958.

Signed at St. Louis, Missouri this 5th day of February, 19

Name..... Name.....

(Signature of applicant) (Signature of applicant)

Title..... Title.....

Name..... Name.....

(Signature of applicant) (Signature of applicant)

Title..... Title.....

Note—This copy of the National Mediation Board's form of application for mediation is prepared by The Order of Railroad Telegraphers for filing purposes only, and must not be used in communicating with the Board, but is intended for filing copy with the President's office and with officers of the organization.

Exhibit 6A.

(Letter of The Order of Railroad Telegraphers.)

December 23, 1957.

Mr. T. M. Van Patten,
Director of Personnel,
C. & N. W. Railway Co.,
400 W. Madison Street,
Chicago 6, Illinois.

Dear Sir:

Please accept this as a formal notice served under the provisions of the Railway Labor Act, specifically Section 6, of the desire of the General Committee of The Order of Railroad Telegraphers on the Chicago and North Western Railway Company to amend the current agreement by adding a rule reading:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

Please advise place, time, and date for initial conference.

Your attention is directed to the status quo provisions of the Railway Labor Act, Section 6.

Yours respectfully,

R. B. Boyington,
General Chairman.

RBB:HD.

Exhibit 7.**National Mediation Board
Washington****February 10, 1958**

**Mr. T. M. Van Patten, Director of
Personnel,
Chicago & North Western Railway Co.,
400 West Madison Street,
Chicago 6, Illinois.**

Dear Mr. Van Patten:

The Board is in receipt of an application for mediation from The Order of Railroad Telegraphers covering a dispute between that organization and the Chicago & North Western Railway Co. on the following subject:

"Request for Rule reading:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

The organization has requested that your attention be called to the status quo provisions, Section 6 of the Railway Labor Act.

Please furnish us promptly with any statement you may care to make on behalf of the company.

Very truly yours,

**E. C. Thompson,
Executive Secretary.**

**cc-to: G. E. Leighty, Pres.,
The Order of Railroad Telegraphers,
3860 Lindell Blvd.,
St. Louis 8, Missouri.**

Exhibit 8.

National Mediation Board

Washington

February 24, 1958

**Case No. A-5696
MB 356**

**Mr. T. M. Van Patten, Director of
Personnel,
Chicago & North Western Railway Co.,
400 West Madison Street,
Chicago 6, Illinois.**

**Mr. G. E. Leighty, President,
The Order of Railroad Telegraphers,
3860 Lindell Blvd.,
St. Louis 8, Missouri.**

Gentlemen:

Reference is made to the application filed by the Order of Railroad Telegraphers for the mediation services of the Board in a dispute with the Chicago & North Western Railway Co. on the following subject:

"Request for Rule reading:

"no position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

This application has been reviewed by the Board. Apparently a proper Section 6 notice has been filed in this matter and accordingly the Board has no alternative except to docket this application. The application has been docketed as case No. A-5696.

It is noted that the carrier makes the following state-

ment in regard to the status quo provisions of the Act regarding this application:

"In your letter you also called attention to the fact that the organizations had called attention to what they called the 'status quo provisions, Section 6 of the Railway Labor Act'. The carrier does not understand that in a case such as the instant case, where there is no rule but only a request for a rule, the service of a Section 6 notice and the status quo provisions can or do result in the carrier being required to operate as if the proposed rule was in fact already negotiated."

Mr. Leighty is requested to advise if this application is intended to cover both the Chicago and North Western Railway Company, including the former Chicago, St. Paul, Minneapolis & Omaha Railway Company or if the application is limited only to the Chicago and North Western Railway Company.

Very truly yours,

E. C. Thompson,
Executive Secretary.

Exhibit 9.

National Mediation Board

Washington

March 7, 1958

Case No A-5696
MB 356

Mr. T. M. Van Patten, Director of
Personnel,
Chicago & North Western Railway Co.,
400 West Madison Street,
Chicago 6, Illinois.

Dear Mr. Van Patten:

Reference is made to our Case No. A-5696 covering dispute between your carrier and the Order of Railroad Telegraphers.

As a matter of information there is attached hereto copy of letter dated March 4, 1958 from Mr. G. E. Leighty, President of the Order of Railroad Telegraphers, pertaining to the above-mentioned case.

Very truly yours,

E. C. Thompson,
Executive Secretary.

cc-to: G. E. Leighty, Pres.,
The Order of Railroad Telegraphers,
3860 Lindell Blvd.,
St. Louis 8, Missouri.

Exhibit 9 A.

March 4, 1958

File: MB 356

**Mr. E. C. Thompson, Exec. Secretary,
National Mediation Board,
Seventh Floor,
National Rifle Association Building,
1230 Sixteenth Street, N. W.,
Washington 24, D. C.**

Dear Sir:

I acknowledge receipt of my copy of your letter of February 24, 1958 to Director of Personnel Van Patten of the Chicago and North Western Railway Company and me, in which you advise that the National Mediation Board has docketed as its Case A-5696 the application this Organization filed with you on a request for a rule which we desire to negotiate with the Chicago and North Western Railway Company on the following subject:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

While we have asked that the status quo provisions of the Railway Labor Act be called to the attention of the Carrier in this connection and while you have complied with that request, it is noted that you advise that the Carrier desires and takes the position that it does not understand that in a dispute such as this the Section 6 Notice, so far as status quo provisions are concerned, is applicable. Needless to say we do not agree with the Carrier's position in that respect.

You ask that I advise whether this application is intended

to cover also the former Chicago, St. Paul, Minneapolis and Omaha Railway. Since we have another agreement effective on that portion of the Chicago and North Western Railway, we have filed a separate Section 6 Notice covering that portion of the system and will make an application for mediation also separate. However, we will be agreeable that the two be handled concurrently in mediation.

Yours respectfully,

G. E. Leighty.

bc: Mr. R. C. Williamson,

Mr. G. J. Schueler.

GHS:em

Exhibit 10.

National Mediation Board

Washington

628 S. Catherine Ave.,
LaGrange, Illinois.

May 27, 1958.

Mr. T. M. Van Patten, Director of
Personnel,

Chicago & North Western Railway Co.,
400 West Madison Street,
Chicago 6, Illinois.

Mr. B. N. Kinkead, Vice President,
The Order of Railroad Telegraphers,
Congress Hotel,
Chicago, Illinois.

Gentlemen:

On February 5, 1958 the Order of Railroad Telegraphers by its duly authorized representative made application in due form and in accordance to the provisions of the Rail-

way Labor Act for the services of the National Mediation Board in the following dispute.

Case No. A-5696 "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

This dispute was assigned for mediation to W. G. Rupp and has been the subject of mediation proceedings, without composing the differences. The mediator reports that he has used his best efforts to bring about an amicable settlement through mediation but has been unsuccessful.

In accordance with Section 5, First, of the Railway Labor Act, the National Mediation Board therefore now requests and urges that you enter into an agreement to submit the controversy to arbitration as provided in Section 8 of the Act.

In making your written reply, which is requested at your earliest convenience, please submit it in triplicate so that we may transmit a copy to the other party as advice of your determination in the matter.

Very truly yours,

W. G. Rupp,
Mediator.

Exhibit 11.

**Chicago and North Western Railway Company
400 West Madison Street
Chicago 6, Illinois**

June 12, 1958

File 69-6-39

**T. M. Van Patten,
Director of Personnel.**

**H. R. Beisel,
Assistant Director of Personnel.**

**Mr. W. G. Rupp,
628 South Catherine Avenue,
La Grange, Illinois.**

Dear Sir:

This will acknowledge receipt of your letter of May 27, 1958 addressed jointly to Mr. Kinkead and me on Mediation Case No. A-5696, in which you requested and urged that Mr. Kinkead and I agree to submit this controversy to arbitration under Section 8 of the Railway Labor Act.

As I indicated to the General Chairman of the ORT in my letter of December 24, 1957, and as I indicated in my letter of February 13, 1958 to the Executive Secretary, National Mediation Board, it is the position of the carrier that the purported notice and request of the organization involved in this case does not in fact constitute a proper subject for a Section 6 notice in that the notice does not in fact concern "rates of pay, rules and working conditions, * * * ", the subject matter on which carriers and representatives of the employes are required to bargain and reach agreements under the Railway Labor Act, but that on the contrary the purported notice constitutes an attempted usurpation of the prerogatives of management in

determining its requirements of employes in the craft or class represented by the ORT.

In view of the fact that, as indicated in the carrier's position in the two letters referred to, copies of both of which letters you presumably have in your file, it would seem entirely inconsistent for the carrier to agree to submit to arbitration a matter which is not even a proper subject for negotiation under the Railway Labor Act, and your request is therefore respectfully declined.

Yours truly,

T. M. Van Patten.

Exhibit 12.

**National Mediation Board
Washington**

June 16, 1958

Case No. A-5696
MB 356

Mr. T. M. Van Patten, Director of
Personnel,
Chicago & North Western Railway Co.,
400 West Madison Street,
Chicago 6, Illinois.

Mr. G. E. Leighty, President,
The Order of Railroad Telegraphers,
3860 Lindell Blvd.,
St. Louis 9, Missouri.

Gentlemen:

We have been advised by Mr. Leighty, President of the organization and Mr. Van Patten, Director of Personnel of the Carrier, in answer to our letter addressed jointly to your respective carrier and organization, under date of May 27, 1958, that the organization and the carrier have

declined, in writing, to arbitrate the question in our Case No. A-5696, as set forth in our letter of February 10, 1958.

Your attention is therefore directed to the last clause in Section 5, First (b) of the Railway Labor Act, as amended, reading as follows:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.

In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act.

We are sending to Mr. Patten a copy of Mr. Leighty's letter dated May 28, 1958 and to Mr. Leighty a copy of Mr. Van Patten's letter dated June 12, 1958.

By order of the National Mediation Board.

Enclosure

E. C. Thompson,
Executive Secretary.

Exhibit 13.

June 20, 1958

**Mr. E. C. Thompson, Executive Secretary,
National Mediation Board,
Seventh Floor, National Rifle Association Building,
1230 Sixteenth Street, N. W.,
Washington 25, D. C.**

File: MB-356
Case A-5696

Dear Sir:

Permit me to acknowledge receipt of my copy of your letter of June 16 to Mr. T. M. Van Patten, Director of Personnel, Chicago and Northwestern Railway Company and me, informing us that the Mediation Board's efforts to dispose of the dispute covered by the above case number have been unsuccessful, that arbitration was declined, and that you are therefore compelled to close your file.

I appreciate very much the efforts of the National Mediation Board to work out a settlement of the differences between the parties in this dispute.

Yours respectfully,

G. E. Leighty.

GHS:BG

c/c—Mr. R. C. Williamson,
General Chairman, Division #76,
1703 Daily News Building,
400 West Madison Street,
Chicago 6, Illinois.

b/c—Mr. G. E. Leighty, President,
c/o Hamilton Hotel,
Washington, D. C.

Exhibit 14.

The Order of Railroad Telegraphers.

Chicago and North Western Railway
System Division No. 76

R. C. Williamson, General Chairman

J. M. Jenks, General Secretary & Treasurer

1703 Daily News Building

400 West Madison Street

Chicago 6, Illinois

Chicago, St. Paul, Minneapolis & Omaha Railway

System Division No. 4

G. J. Schueler, General Chairman

512 Fifth Street

Hudson, Wisconsin

H. A. Sauleen, General Secretary & Treasurer

2912 44th Avenue, South

Minneapolis 6, Minnesota

July 10, 1958

To All Members Employed On:

Chicago and North Western Railway

Chicago, St. Paul, Minneapolis & Omaha Railway (Twin
Cities Division, C. & N. W.)

Greetings:

Since Mr. Ben Heineman and his crowd secured control of the Chicago and North Western Railway System we have all witnessed a revolution in the management of this railroad. All types of service on which the railroad does not have a monopoly have been drastically curtailed with corresponding inhuman slashes in employment in all crafts. The loss of business resulting from curtailed service, in

turn, leads to further reductions in force and further reductions in service; and so the vicious spiral goes on.

Last fall a program of this sort that is of vital concern to our members was initiated by this management. This program is directed at the elimination of the vast majority of agents serving one-man stations. Proceedings were begun before the Public Service Commissions of South Dakota, Minnesota, Iowa and Wisconsin seeking authority either to close nearly all the one-man stations or to have one agent serve two, three or four stations. Similar proceedings in other states may be expected momentarily.

In the public interest, as well as in the interest of our members and the organization as a whole, we have done everything possible to resist this program. Through reliance on the provisions of our Agreements, through informing the residents of the affected communities as to the consequences of the railroad's actions and through attendance at all the hearings of the various commissions and the presentation of evidence and argument, we have tried to make reason, common sense and humanity prevail. Since last November practically all of the time of your General Chairmen and four Vice Presidents as well as much of the time of a number of our Local Chairmen and our General Counsel and of our President has been devoted to these efforts.

However, it became evident at an early date that to meet this onslaught effectively would require strengthening of our Agreements. Accordingly, in December 1957 the General Chairmen, with the approval of President Leighty, served on the management a notice pursuant to Section 6 of the Railway Labor Act proposing to add to our agreements the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

The management refused to discuss this proposal on its merits, taking the position that it was not a proper subject for bargaining. Management representatives did meet with the General Chairman and Vice President Kinkead on January 17 but only to reiterate their position that the subject was not proper for bargaining under the Railway Labor Act. We then invoked the mediatory services of the National Mediation Board. That Board took jurisdiction notwithstanding the position of management as to the propriety of bargaining on the subject matter. The Mediation Board exerted its best efforts to obtain a settlement of the dispute but was unsuccessful. The Board notified us and the management on June 16, 1958 that its efforts had failed and that its services were being terminated.

This course of events brings the matter to a point where the members employed on this railroad must decide whether they are willing to stand up and fight for decent conditions or whether they will stand by and let this devastating process continue. We are accordingly submitting this issue to the membership in the form of a strike ballot.

The need for the proposed rule has been becoming more and more clear as time has passed. Recent events in South Dakota leave no doubt about it. The Commission there, on May 9, 1958 by a 2 to 1 vote with Commissioner Merkle dissenting, issued an order purporting to direct the management to put into effect exactly the program the management had proposed. Although during the hearings the management had acknowledged that this could not be done without agreement with our organization, the Commission stated that its order would relieve the carrier of any obligations under our agreement. We did not get a copy of the order until May 15, 1958. On May 14, 1958, before we

even had seen the order, the management sent out telegrams immediately abolishing fifty-three positions and enlarging the assignments of sixteen others of the agents involved in the proceedings.

The Commission's order could not be appealed under the law until a petition for rehearing was acted upon. We promptly filed a petition for rehearing and requested suspension of the order pending action on the petition. Suspension was not granted. The National Mediation Board proffered its services on an emergency basis and requested the Commission temporarily to stay its order and asked the carrier to maintain existing conditions during mediation. Both requests were refused.

We then brought suit against the railroad and the Commission in the Circuit Court at Sioux Falls, South Dakota to enjoin the carrying out of the plan on the ground that the Commission's order was unlawful and the carrier's action under it violated the Railway Labor Act. We got a temporary restraining order but the carrier took the position that the plan was already in effect and went right on forcing the immediately affected employes to exercise their displacement rights and those whom they displaced to do likewise. After a hearing on June 25, 1958 our suit was dismissed on motion of the carrier because the Court concluded that the Commission's order could be challenged only by appeal, even though no appeal could be taken at the time the suit was brought.

In the meantime the Commission denied the petition for rehearing thus making an appeal to the courts available, and we have taken prompt steps to initiate an appeal. But while the appeal is being acted upon we have found no effective means to restore the conditions existing before

the Commission's order. The employes immediately affected have had to exercise seniority if they had sufficient service or to retire or find other employment. Other employes displaced by them have in turn been placed in the same predicament and so on. In wholesale fashion, homes are having to be sold, families disrupted from churches, schools and community lives and new homes having to be established. We must prevent a continuance of such a program.

While we hope the commissions in other states will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota. In his testimony before the various State Commissions, Mr. Heineman has also said that further reductions are planned in all groups and the only manner in which we can properly protect the employes we represent is through a positive rule in our Agreements such as we have proposed. And the only way such a rule can be secured is by demonstrating our determination through strike action.

We are asking all members employed on this railroad to vote on this critical issue. If as a result of this vote a strike is determined upon pursuant to our Constitution, all members will be expected to join in the strike irrespective of how they voted. There is to be no strike until the date and time are officially set after proper authorization has been secured.

Fraternally yours,

General Committee—Division 4

G. J. Schueler, General Chairman

H. A. Sauleen, General Secretary & Treasurer

L. C. Claxton, Local Chairman

General Committee—Division 76

R. C. Williamson, General Chairman
J. M. Jenks, General Secretary and Treasurer
G. S. Muto
Thorwald Larsen
R. J. Brick
R. B. Garrigan, Jr.
J. A. Newhouse
W. T. Roberts
J. B. Arends
L. W. Nelson
H. J. Livesey
L. A. Craig
J. F. Winn
J. E. Foreman
C. F. Weber
G. F. Adams

Local Chairmen**Approved:****G. E. Leighty, President**

Official Strike Ballot

Chicago and North Western Railway System

The Order of Railroad Telegraphers

System Divisions No. 76 and No. 4

I have carefully read, or heard read, the accompanying circular signed by the members of the General Committees of Divisions No. 76 and No. 4 and approved by the President of The Order of Railroad Telegraphers, and this ballot, and understand the question is that of authorizing the calling of a strike and the fixing of a time therefor, in accordance with the laws of The Order of Railroad Telegraphers, for the purpose of securing an acceptable settlement of a pending dispute, namely:

Proposal to add to existing Agreements the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

For A Strike.....

Against A Strike.....

Signature

P. O. Address

Your classification

R.R. Division on which you work

O. R. T. Certificate

Detach and vote this ballot and return it to your General Chairman not later than July 31, 1958.

Exhibit 15.

The Order of Railroad Telegraphers

3860 Lindell Boulevard

St. Louis 8, Mo.

**G. E. Leighty
President**

**Telephone
JEfferson 3-8321**

August 18, 1958.

**Strike Call And Instructions Pertaining To Conduct Of
Strike.**

To All Local Chairmen, Members and Employes

**Represented By The Order Of Railroad Telegraphers
On The Chicago And North Western Railway
Chicago, St. Paul, Minneapolis & Omaha Railway (Twin
Cities Division, C. & N. W.)**

Dear Sirs and Brothers:

The Issues.

On July 10, 1957, we submitted to the membership on the Chicago & North Western System a strike ballot seeking the views of the membership as to whether a strike should be authorized if necessary to secure a satisfactory settlement of the dispute arising from our proposal to add to existing agreements the following rule:

**"No position in existence on December 3, 1957, will
be abolished or discontinued except by agreement be-
tween the Carrier and the Organization."**

In the circular we summarized the circumstances giving rise to the urgent need for such a rule. We pointed out the general onslaught of this Carrier on the employment

of the people we represent, and particularly the system-wide, wholesale elimination of agency positions and enlargement of assignments of the remaining agents. We recited the brutal conduct of the carrier in South Dakota in abolishing 53 positions and enlarging the assignments of 16 others, all in one day, before we even had notice of the Order of the South Dakota Commission under which the Carrier purported to act. We also told you of our strenuous, patient, but futile efforts to correct the situation under the Railway Labor Act and in the Courts.

The need for the proposed rule has again been tragically demonstrated in the last few days. What happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged.

The vote on the strike ballot was almost unanimous in favor of a strike. The time has come to act in accordance with that vote.

I am setting a date for your withdrawal from the service of The Chicago and North Western Railway Company and The Chicago, St. Paul, Minneapolis & Omaha Railway (Twin Cities Division, C. & N. W.) and I am issuing the instructions to govern that withdrawal in accordance with the laws of our organization.

Time And Date Of Strike.

Acting Pursuant To The Constitution And Laws Of Our Organization, And With The Approval Of Your Committees, A Strike Of The Employes We Represent On The Chicago And North Western Railway And The Chicago, St. Paul, Minneapolis & Omaha Railway (Twin Cities Division, C. & N. W.) Is Hereby Called To Commence On Thursday, August 21, 1958, At 6 A. M. Central Standard Time And 5 A. M. Mountain Standard Time.

Duties of Employes and Officers in Conduct of Strike—

In connection with the strike the following instructions are to be observed:

1. No employe in service involved in the strike will perform any service after the hour set to strike.

Those employed at points where joint service is performed for other roads, will on the receipt of this letter notify the proper officers of the carrier whose facilities are joint with the Chicago and North Western Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway (Twin Cities Division, C. & N. W.) that on and after 6 a. m. Central Standard Time and 5 a. m. Mountain Standard Time, August 21, 1958, they will not be on duty, giving the reasons why.

Employes of other railroads, terminals or joint facilities who also perform service for the Chicago and North Western Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway (Twin Cities Division, C. & N. W.) and who are not ordered on strike, will discontinue performing any service for the Chicago and North Western Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway (Twin Cities Division, C. & N. W.).

2. All employes on strike will keep away from the company property except such men as are designated certain duties to be performed in furtherance of this strike by authority of the organization.

3. At various points on the carrier system the organization will arrange for halls for meeting purposes. Consult your Local Chairman or other authorized representative for information as to location of the point at which you are to meet. Immediately after the strike becomes effective all men except those assigned to immediate picket duty will assemble at the designated meeting halls. All strikers will be expected to register and be available for assignment to picket duty.

Only persons on strike and duly accredited representatives of the organization will be permitted to be present in the meeting halls.

4. Detailed daily instructions concerning the conduct of the strike will be given at the meeting halls. All strikers will be required to attend such meetings unless on picket duty or excused by the Chairman of the meeting.

5. Every employe must understand that the laws of the organization must be obeyed. Acts of violence of any nature will not be tolerated by the organization.

6. In the conduct of every strike there are numerous irresponsible persons, not members of the organization, who take occasion to engage in acts of violence and disorderly conduct. Such acts are usually attributed to members of the organization and great care should be taken by all employes to avoid associating with such persons.

7. Some carrier officials or their emissaries may endeavor to coerce or mislead the men by asserting that men at other points have not gone on strike or that they have returned to work. Such statements should be ignored and all strikers should apply to their officers and committee-men for information and be governed accordingly. No employes will return to work until the strike is officially terminated.

8. Employes on picket duty are expressly instructed to grant permission to train and engine service employes to cross picket lines to the extent necessary to bring passenger trains that are en route at the time strike is called to their destination and to bring freight trains that have already left a terminal to their next terminal. We wish to avoid the harm that would be caused to the public by leaving passengers or freight stranded en route at the time strike is called. Employes of classes or crafts other than those on strike are requested to refrain from crossing picket lines except to the extent herein indicated.

9. The Local Chairmen of each Committee will be instructed as to their duties by their General Chairman and Grand Lodge Officers.

10. Special Instructions for Employes in Certain Occupations.

Crossing Watchmen and Drawbridge Tenders. Crossing Watchmen and Drawbridge Tenders will notify their supervisory officers of the fact that they will not perform service subsequent to 6 a. m. Central Standard Time and 5 a. m. Mountain Standard Time, August 21, 1958.

Precautions to be taken. Employes should make every possible effort to deliver any perishable freight they have on hand to the consignee; remit All company cash to the proper official, or designated depository without regard to the regular remittance period, place valuables in the safe or other safe depository, properly secure ticket cases, cut out telegraph and dispatchers' telephone instruments (at points where they are installed) so that through circuits may be protected; set your signal or signals in the manner prescribed or required of an employe going off duty, lock up freight house and ticket office and be sure everything is safe before you leave your station. Take your keys with you and retain them until properly checked out by a duly authorized representative of the railroad.

Agents. Railroad Station Agents who handle express for the Railway Express Agency should make every possible effort to deliver to consignee, all perishable goods which may be on hand, prior to the period the strike becomes operative. Valuable packages which cannot be delivered should be reshipped to some division office of the Express Company for safekeeping. No shipment of perishable, valuable or other important freight should be received just prior to the strike period on account of damage or inconvenience which might be caused by delay. After the strike period arrives, no shipments of any kind

should be received or forwarded, nor should any attention be paid to Route Agents or other officials who may try to induce Agents to transact business of the company.

You should notify the citizens in your locality of the pending strike in order that they may not be unduly inconvenienced thereby and have time to make the necessary arrangements to protect themselves.

All funds due the Express Company should be remitted and receipt taken for the remittance.

Bond and Indemnity Relations. Station Agents, cashiers and other bonded employes have the same right to cease their employment and relinquish their responsibilities as all other citizens of the United States. You should, therefore, pay no attention to plausible misstatements which may be made by railroad or express officials who may try to influence you to remain in the service on the grounds that you are bonded and liable. You are not liable under the law for anything that transpires at your station after you cease employment and should either the railroad or the Express Company or any person attempt to work an injury on you, your organization will defend you in the courts or elsewhere without regard to trouble or expense.

United States Mail. Railroad employes, required to handle United States mail by the railroads, are not in the Government service and, therefore, no legal obligations rest upon them to perform this service. The railroads have contracts with the Government for the performance of this service, for which they receive payments, while the employes are required by the railroads to handle the mail without payment therefor. When the strike period arrives, you will decline to perform this service in the same manner as all other service.

Telegraphers, Towermen, Block Operators, and Telephoners. When the strike period arrives, you should

promptly cease work, cut out telegraph and dispatchers' telephone instruments so that circuits may be protected, set all signals in the manner prescribed or required of an employe going off duty and otherwise perform the functions of closing your office in a way that will insure safety to the public, your fellow employes and the property of the railroad. If train orders are on hand to be delivered at the hour the strike is called you should notify the train dispatcher and unless the orders are cancelled or annulled you must leave your signals in a stop position.

Telegraphers, tower directors, towermen, levermen, block operators and telephoners, whose assignment is scheduled to begin after the strike is on should join other employes and refrain from work.

The Railroad Retirement Board has been advised of this action and will designate representatives for the purpose of your filing for unemployment compensation. Their names and locations will be furnished to you at a later date.

You will keep this circular private; read it carefully and carry out its provisions to the letter so far as it applies to you; see others directly interested and in the event they fail to receive a copy instruct them in accordance with the terms set forth herein. Failure to receive this circular is no excuse for remaining in the service after the strike has been declared. Every employe, member and non-member, is expected to obey the strike order which has been issued and any person remaining in the service after the strike is on will be designated as a strike-breaker.

Clearly defined cases of disloyalty or indifference on the part of any person involved in the strike should be reported to the organization and necessary action, either as to discipline or safety measures, taken at once.

Your officers are convinced that a firm stand at this

time will result in a victory for you in this important situation and have full confidence in your courage and integrity.

Fraternally yours,

G. E. Leighty,

President.

C. J. Schueler,

General Chairman,

System Division 4,
512 Fifth Street,
Hudson, Wisconsin.

H. A. Sauleen,

General Sec. Treas.

System Division 4,
2912 44th Avenue South,
Minneapolis 6, Minnesota.

R. C. Williamson,

General Chairman,

System Division 76,
1703 Daily News Building,
400 West Madison Street,
Chicago 6, Illinois,

J. M. Jenks,

General Sec. Treas.,

System Division 76,
1703 Daily News Building,
400 West Madison Street,
Chicago 6, Illinois.

Exhibit 16.

(Form of Western Union Telegram.)

1958 Aug. 20 AM 8 30

CA004 PD—FAX Washington DC 20 850 AME—

G. E. Leighty—

Congress Hotel—

Re case E—175 C&NW and ORT Mediator reports unable to effect settlement in this case. You are therefore notified NMB is closing its file on E-175 as of this date. Board however stands ready to make its services available in case either party desires further mediation efforts. By direction of National Mediation Board. Joint Van Patten, Leighty, Rupp—

E C Thompson Exec Secy NMBM

IN THE UNITED STATES DISTRICT COURT.

• • (Caption 58-C-1538) • •

ANSWER TO AMENDMENT TO COMPLAINT.

1. The defendants deny the allegations of paragraph 12 (a) of the Amendment to Complaint except that defendants admit that on August 22, 1958 R. C. Williamson, General Chairman of the Telegraphers on the plaintiff's railroad, received the letter, copy of which is attached hereto and made a part hereof as Exhibit A. On the same day R. C. Williamson responded thereto by letter, copy of which is attached hereto and made a part hereof as Exhibit B. Defendants further aver that the plaintiff's belated effort to inject a frivolous claim never heretofore raised is irrelevant to any issue in the dispute involved in the impending strike. For the reasons set forth in said letter

the new issue raised by the plaintiff is not in any event referable to the National Railroad Adjustment Board. A copy of Article VI of the Agreement of November 1, 1956 referred to by the plaintiffs as "the moratorium provisions" is attached hereto and made a part hereof as Exhibit C.

2. The allegations of paragraph 12 (b) of the Amendment to Complaint are irrelevant to any issue in the dispute involved in the impending strike or in this case and require no answer.

Alex Elson,
Schoene and Kramer,
By Alex Elson,

One of the Attorneys for Defendants.

Alex Elson,
11 South LaSalle St.,
Chicago, Illinois,
Schoene and Kramer,
1625 K Street N. W.,
Washington, D. C.

State of Illinois, } ss.
County of Cook. }

G. E. Leighty, being first duly sworn on oath, deposes and says that he is President of the defendant Telegraphers. Affiant further states that he has read the foregoing Answer to Amendment to Complaint and that all of the allegations of the said Answer are true in substance and in fact.

G. E. Leighty.

Subscribed and sworn to before me this 23rd day of August, 1958.

(seal)

Dawn S. Wolff,
Notary Public.

Exhibit A.

(Letterhead of Chicago and North Western Railway Company, Chicago 6, Illinois.)

August 21, 1958

File 69-6-39

Mr. R. C. Williamson
1703 Daily News Building
400 West Madison Street
Chicago 6, Illinois

Dear Sir:

Please refer to former General Chairman R. B. Boyington's letter of December 23, 1957 serving a formal notice on the Chicago and North Western Railway of the desire of the General Committee of the ORT to amend the current agreement by adding the provision:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the organization."

Even though it is still our position that such provision does not in fact constitute a proper subject for a Section 6 notice on which carriers and representatives of employes are required to exercise every reasonable effort to reach agreements under the Railway Labor Act, it is also our position that your notice of December 23, 1957 is barred under the provisions of Article VI of the agreement effective November 1, 1956 between this and numerous other carriers and the ORT and certain other non-operating railroad labor organizations, with which I am sure you are entirely familiar. Our basis for this position that your notice is barred by Article VI is as outlined in the attached memorandum.

It is therefore our purpose to submit this question to the Third Division, NRAB, for determination.

Yours truly,

/s/ T. M. Van Patten

Exhibit B.

(Letterhead of The Order of Railroad Telegraphers,
Chicago 6, Illinois.)

August 22, 1958

Mr. T. M. Van Patten, Director of Personnel
Chicago and North Western Railway Company
400 West Madison Street
Chicago 6, Illinois

Dear Sir:

This will acknowledge receipt of your letter of August 21, 1958, stating that it is your purpose to submit to the Third Division, National Railroad Adjustment Board a question as to whether our Section 6 notice of December 23, 1957 is barred by Article VI of the Agreement of November 1, 1956.

The Agreement of November 1, 1956 is a Mediation Agreement reached through mediation under the provisions of the Railway Labor Act in Case A-5256. The question you now raise for the first time seeks to raise a controversy over the meaning or application of Article VI of said agreement. In case of any such controversy Section 5, Second of the Railway Labor Act authorizes either party to the agreement to apply to the National Mediation Board for an interpretation of its meaning or application. In docketing the dispute arising under our December 25, 1957 notice the National Mediation Board held that a proper Section 6 notice had been served.

The question you now raise is not referable to the National Railroad Adjustment Board not only because of the specific primary jurisdiction of the National Mediation Board over the interpretation of mediation agreements, but also because it does not fall within the statutory jurisdic-

Answer to Amendment.

tion of the Adjustment Board. Section 5, First, (i) of the Railway Labor Act permits reference to the Adjustment Board only of disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". Article VI of the Agreement of November 1, 1956, although contained in an agreement other parts of which concerns rates of pay, rules or working conditions, does not itself concern rates of pay, rules or working conditions within the meaning of Section 5, First, (i). You have heretofore recognized this to be true and have not handled the question on the property in the usual manner for handling disputes referable to the Adjustment Board as the law requires prior to such disputes being referred to the Board.

Very truly yours,

Exhibit C.**"Article VI—Duration of Agreement.**

"The purpose of this Agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending notice to—

- (a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement.
- (b) Increase or decrease the rate of compensation provided in existing agreements or understandings, or eliminate or establish agreements providing the rate of compensation, covering overtime payments, arbitrary payments, Sunday or holiday payments, time paid for but not worked, or increase or decrease the number of paid holiday or paid vacation days.

- (c) Increase or decrease the amount of payments required to be made by the Agreement of December 21, 1955, and Article V of this Agreement for hospital, medical and surgical benefits for the employees and their dependents.
- (d) This Article VI does not prevent adjustments under normal processes on the individual carriers in the rates of pay of individual positions; correction of inequities as between rates for different individual positions on a particular railroad; or negotiation of rates for new positions or positions where the duties or responsibilities have been or are changed. This Article VI will not debar management and committees on individual railroads from agreeing upon any subject of mutual interest.
- (e) This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment, separation allowances or other matters not prohibited by the foregoing provisions of this Article VI."

44

IN THE UNITED STATES DISTRICT COURT.

* * * (Caption—58-C-1538) * *

Wednesday, August 27, 1958.

Present: Honorable J. Sam Perry, District Judge.

This being the day to which this cause was continued for further hearing on plaintiff's motion for a preliminary injunction the parties again come by their attorneys and the hearing proceeds and the Court having now heard all the evidence adduced by the parties and being fully advised it is

Ordered that the temporary restraining order heretofore entered on August 20, 1958, and all its terms and conditions, including the bond, remain in effect until September 6, 1958 at 12 o'clock, midnight, and it is

Further Ordered that simultaneous brief be filed by counsel on or before September 2, 1958 and that this cause be and hereby is set for final argument on September 5, 1958 at 10 o'clock, A. M.

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—58-C-1538) • •

Friday September 5, 1958.

Present: Honorable J. Sam Perry, District Judge.

This cause this day coming on for further hearing on plaintiff's motion for a preliminary injunction the parties come by their attorneys and the hearing proceeds and the Court having now heard all the arguments of counsel it is

Ordered that the temporary restraining order entered herein be and it hereby is continued in full force and effect until September 19, 1958 at 12 o'clock, midnight, and it is

Further Ordered that the cause be and hereby is continued to September 8, 1958 at 2 o'clock, P. M., for the entry of findings of fact, conclusions of law and final decree.

TRANSCRIPT OF TESTIMONY.

Colloquy.

(Portion of Opening Statement of counsel for defendants, Mr. Elson.)

7 "The Court: Did they (The National Mediation Board) find against the plaintiff's contention and find that it was bargainable?"

"Mr. Elson: They did not make such a finding, your Honor. They simply found that the Section 6 notice was properly filed within the Act."

8 "We were confronted with what they regarded—and the evidence will show is a major issue of importance to the life of the organization involved, and in order to decide what to do they took a strike ballot in which they set forth by the accompanying circular all of the facts related to the issue. The membership overwhelmingly voted in favor of strike, and thereupon the strike was called. So that the basic issue is that issue now."

ABSTRACT OF THE TESTIMONY.

22 BEN W. HEINEMAN, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

My name is Ben W. Heinéman. I live at 1126 East 48th Street, Chicago, Illinois. I am the chairman and chief executive officer of the Chicago and North Western Railway. My duties consist of the general supervision of the affairs of the company.

I first assumed the position of chairman of the railroad on April 1, 1956, when Mr. Clyde J. Fitzpatrick,

23 our president, and I took office. Prior to that time I had been chairman of the executive committee and a member of the Board of Directors of the Minneapolis and St. Louis Railway Company for a period of two years. I am a member of the Board of Directors of the Association of American Railroads.

24 The general subject matter of the hearing today concerns some agency position questions. There were hearings before State Commissions concerning the central agency plan for the North Western Railroad. I was present and I testified at these hearings. The Order of Railroad Telegraphers was also present. At three hearings they testified through Mr. George Leighty, their president, with Mr. Schoene, their general counsel. At one proceeding in Minnesota their vice president, Mr. Kinkead, and Mr. Shuller, represented them. Not only did Mr. 25 Leighty testify on the issues at those hearings on behalf of the O. R. T., but also various members of the O. R. T. testified.

I was in court this morning when Mr. Elson said that the North Western Railroad had never at any time been willing to bargain with the O. R. T. We have indicated a willingness to discuss these problems with the O. R. T. As to when I indicated such a willingness, hearings were being held in Madison, Wisconsin, on the Wisconsin station closing case. At that time I was testifying and Mr.

George Leighty, president of the O. R. T. and Mr. 26 Lester Schoene, their general counsel, were present and representing the union. The date in question was May 26, 1958, after the rule in this case had been requested.

During a five minute recess in the morning, I walked over to Mr. George Leighty and to his general counsel, and I said, "George, I wonder if it would be possible for us to get together in the corridor for a few minutes

at the noon recess?" Mr. Leighty was kind enough to say that he would be glad to do that. At the noon recess Mr. Leighty, Mr. Lester Schoene, their general counsel, and Mr. Fitzpatrick, the president of the North Western Railroad, and I met in the corridor. At that time I said, "George, do you think there is any possibility of our sitting down and working out these station closing matters and the discontinuance of the positions of these station agents?"

Mr. Leighty turned to Mr. Schoene, his general coun-
sel, and said, "Well, what do you think, Lester?" Mr.
Schoene said, "I think we are too far apart."

And I said, "Well, that is up to you gentlemen, but I want you to know that my door is always open." We have never heard from them since.

I am familiar with the verified complaint and amended complaint which have been filed in this case. Plaintiff's Exhibit 1 for identification is a system map of the Chicago and North Western Railroad, which is not strictly to scale but correctly portrays the area.

28 (At this point PLAINTIFF'S EXHIBIT 1 was received in evidence.)

The North Western Railroad has 9300 miles of roadway. That does not mean 9300 miles of track, because its track is in the nature of 20,000 miles or more; but much of the roadway is double track and siding, and so forth. It

has 9300 miles of roadway on a single track basis.

29 83,000 passengers are carried on workdays by the North Western Railroad. Saturdays and Sundays that amount drops considerably because of our heavier commuter load. I am not sure of the weekend figures. I would estimate it is in the neighborhood of 5,000 to 10,000 on weekends. It is 83,000 passengers a day on weekdays.

We handle approximately 81,000 to 82,000 suburban commuters in this area on each workday, Monday through Friday, on the North Western System.

30 In the month of August we handled roughly 1,150,000 tons a week of freight. It is seasonal, of course, and we are approaching our peak season.

There are 18,372 employees on the North Western System. Our net investment after reserves for depreciation in physical operating property is approximately \$480,000,000. This does not include cash, materials, investments in nonoperating property and the like. The North Western handles some 30,000 pieces of United States mail a day. I cannot tell with precision the number of plants, factories and other industrial enterprises which we serve, but there are certainly several thousand such plants served by the North Western.

31 The North Western is the largest switching railroad in the Chicago area. By that I mean we have more sidings and serve more companies than any other railroad. Now what this means is that even though other railroads may have the line haul, in case of a strike the industries that we serve in the Chicago area, as the largest switching carrier, would be unable to receive the goods, whether handled by other railroads in line haul or not.

The North Western System has three separate trunk lines from Chicago. One goes directly north up along the lake shore, and with a parallel out up through the Fox River Valley on up to the upper peninsula of Michigan. A second trunk goes northwest through Harvard and on up to Madison, Wisconsin, and so on. A third trunk line goes directly west via Oak Park, DeKalb, and so on, 32 to Clinton, Iowa, and Omaha. Now, of course, there are parallel lines in South Dakota and Nebraska, in Iowa and elsewhere, but those are the three major trunk lines stemming from Chicago.

Last year we handled about 1,414,000 revenue carloads of freight excluding company freight and empties. We handled many hundreds of thousands of empties for other railroads, which is essential to them.

The layout of the North Western Railroad, as previously described is three trunk lines, and being a major switching carrier in Chicago, also results in the North Western having a number of interchange points with other railroads. An interchange point is where we interchange traffic with other railroads. The North Western has interchange traffic directly with 59 other railroads at some 440 separate cities or points. Now, I don't include in that interchanges for deliveries to such switching carriers as intermediate carriers, such as the Indiana Harbor Belt or the Belt Line, to whom we have delivered traffic. Of course, they fan out to the east. I don't include in that such carriers as the Terminal Railroad of St. Louis, which fans out to the south and southwest, and so on.

34 Because the North Western is such a substantial originating carrier, a strike would have a material effect, obviously, on the traffic that was delivered to the carriers that interchange with the North Western at those points and received by us, because we are such a major terminating carrier, the traffic received by us from them. I have no opinion about the effect of the finances of a strike on these other railroads.

Plainly, we would not carry the 81,000 or 82,000 people a day, and in my opinion, based on my personal knowledge of the commuting situation on the north shore, and northwest side, and the west side of Chicago. The strike would paralyze that area as well as the downtown area and the Loop area.

35 As to whether we would not be able to run any trains so that there would be no service and as to whether we would be paralyzed. My understanding is if the Order of Railroad Telegraphers goes out on strike, that the probabilities are that all of the other Brotherhoods would honor their picket lines, and it is our understanding—and we would prepare on that basis—that the railroad would stop all operations.

The telegraphers or the members of this craft represented by the O. R. T. are station agents, telegraphers, teletelers (that is to say, who use the telephone for the same purpose that telegraph was theretofore used for), they are interlocking tower men, drawn bridge operators, wire chiefs and other communication facilities.

When I say they are draw bridge operators, The North Western includes bridges over a great many navigable rivers. In Chicago, for example, we operate bridges over the Chicago River. In Milwaukee we operate bridges over the river that comes in there from the harbor. We operate bridges over the Mississippi, and so forth. The draw bridges are manned by members of the O. R. T.

The North Western Railroad serves a grain growing area of our country. As to the consequences on the movement of grain if the North Western were shut down, we are completing the early harvest on the North Western because of our northern territory and moving it into the Fall harvest. This is a peak harvest year. It may indeed set records. It may indeed break all records. Elevators in those areas and farmers are dependent upon the North Western. Many of them are served exclusively by the

North Western, and that grain simply could not move.

37 The North Western also serves certain federal and state highway jobs. Some of them are served exclusively. As to the effect on those jobs if service from the North Western were shut off, well, to the extent that they could, I suppose that they would try to divert that traffic primarily to trucks, and to the extent that they could not divert, in my opinion, those jobs might be very difficult, and then they would simply stop.

The North Western also serves certain ore producing parts of our country. The North Western Railroad developed the ore mining of the northern peninsula of Michigan. We had a railroad up there before it was connected

with other portions of our railroad. For over 70 years or more, I guess 90 years, we have had docks on the shores of Lake Michigan and Lake Superior and we haul from the mines to these docks, and the boats come up to these docks, which are operated by the North Western Railroad to take the boatloads of ores to the steel companies. Inevitably this is a brief season because it is closed by the ice. Were this railroad closed by strike, those docks and ore hauling operations would come to an end.

We have 18,372 employees, of whom 1600 are employees of the Order of Railroad Telegraphers. If the strike came off, and the railroad was closed, plainly the 18,372 would be, except for some supervisory employees included in that number, out of work, if they honored the picket lines, and I assume they would. At the present time, the North Western payrolls are approximately \$10,000,000 a month, or, roughly, \$333,000 a day.

As to the revenue loss to the company if it were unable to operate, in the month of August we are projecting revenue of between nineteen and twenty million dollars. July was fractionally under nineteen million dollars. So the revenue loss would be in the neighborhood of \$650,000 a day or nineteen or twenty million dollars a month.

Plainly those shippers who are dependent upon the North Western would divert their traffic. When that is diverted there is always a problem both for the railroad and, of course, for the railroad's employees as to whether or not that traffic can be recaptured. History has been that once diversion takes place, you do not recapture 100 per cent of the diversion.

The North Western is the oldest railroad out of Chicago. It was started with its predecessor company in 1848, or

'46, and in that 112 years or so it alone has never been struck.

41 As to whether the effect of a strike might be to force the North Western Railroad into receivership, well, any time an individual railroad that has been in weak financial condition attempts to take on the strength of national unions in concert, powerfully helped and financed, it is a very dangerous and difficult job. However, history is filled from biblical times down through the Battle of Britain, where the underdog won when they thought they were right. All I can say in answer to the question is that we would do our best.

There is a relationship between the dispute which we have here involved in this proceeding and the physical and financial condition of the North Western when I first took office in 1956.

42 When Mr. Fitzpatrick and I came to the property on April 1, 1956 it was in a very serious condition and it was apparent not only to us but to many people, that very serious surgery was going to have to be performed if the railroad was going to be preserved for the public, for its employees and for its security holders. The railroad had already lost in the first three months some eight million dollars and the costs were continuing at an alarming rate. Cash was so low that Mr. Fitzpatrick and I had serious question as to whether we would be able to meet the payrolls in September.

It had deteriorated from a postwar high. Because of the deterioration of its equipment and roadway, with the accompanying slowdown in trains and services, and deterioration of services, its relationships with its shippers, or with many of its shippers, were seriously strained, as were its relationships with its suburban commuters and passengers.

Physically we found that the road was still operating

some 260 steam engines, although in our opinion, and primarily in Mr. Fitzpatrick's opinion as the operating man, the road probably had enough Diesels for Dieselization. It had bad order cars standing idle all over the railroad, although its shippers at that time were screaming for equipment, and although there was a national shortage. Its right-of-way, even its main line, was in many areas in such a condition that we were simply not competitive on freight schedules, with a declining amount of business to the inevitable detriment of everyone connected with the railroad, both management, labor and the public.

The methods that we were using, both from a railroad operating standpoint and from repair of equipment, repair and maintenance of right-of-way, and from its communications standpoint, were obsolete. It not only did not reflect the best in railroad operation, but, in my opinion, came very close to reflecting the worst in railroad operation.

44 We had points where we repaired cars, rebuilt them, and Mr. Fitzpatrick and I examined them early in April of '56. Men were working in water and in snow on their backs outdoors. We abolished all those points and built a modern, heavy car repair plant at Clinton, Iowa, costing some six million dollars, which is one of the most efficient in the country.

In terms of its right-of-way, it was a pick and shovel railroad. Men were doing work that other railroads had long since eliminated. In our first two winters, we spent a million dollars each to buy modern track equipment so as to enable men to do the kind of work that was being done on our competing railroads.

In the first six weeks that we were on the railroad, Mr. Fitzpatrick succeeded without the addition of any Diesels in Dieselizing the entire railroad, thereby doing things of considerable importance. It abolished the steam loco-

motive with its costly operations, and it was a first step in the saving of our branch lines because the North Western has heavy branch lines, and the elimination of the steam engine and introducing of Diesels reduced the cost of 45 operation of those branch lines to the point where they gave promise that we would be able to retain them for the rural areas that we serve.

When you talk about physical functions, you are talking about people, and when you talk about obsolete methods of repairing cars, or a pick and shovel method of doing maintenance, or operating steam engines, you are talking about human beings. When we came to this property, inevitably because of the conditions I have described, we found that the North Western was operating with the highest labor ratio, which means the worst ratio of 47 wage and salary expense to the revenue dollar of any railroad in the United States, bar none, and that it has been operating in that fashion for at least the five years that I personally stuck with it.

We undertook various programs to correct that 49 condition. We put in effect a modernization program at the Proviso Yard. Other modernization programs 50 were undertaken concerning rates.

The railroad business today, unlike its prior history as a monopoly, has radically changed and is today one of the most highly competitive businesses in the United States. Railroads are competing with pipelines, with the river, trucks, buses, with airplanes, and with the private automobile and, of course, with each other. It has been our strong opinion that the day of passing on additional costs of inefficient nature in the form of higher rates to our shippers and higher fares to our passengers has long past. The North Western, in particular, and railroads in general must be concerned with constantly increasing their efficiency, eliminating waste and inefficiency wherever found,

to the end that they may reduce rates and thereby improve their share of the competitive market. The North Western has been taking a lead in that respect. Only recently it has been announced that the North Western took the lead in reducing grain rates throughout its territory to a degree not theretofore reduced in history. We have reduced 51 coal rates. We are in the process of reducing rates on a broad front. To do so, however, requires maximum efficiency in the operation of a railroad.

We have undertaken programs concerning the improvement of the suburban service. Unlike many other carriers, the North Western happens to believe and has stated publicly on many occasions that a suburban operation need not be a losing or a hopeless operation. When we came to the property, the equipment was not what we thought it should be. Some of the schedules were not as rapid as we believed they should be. One of the first things we did, as I already indicated, was to Dieselize the suburban service. We have brought in a substantial number of double-deckers, modern, air-conditioned, new coaches, at a very substantial investment. In the last few years we have made an investment in the suburban service of over sixteen million dollars. We have publicly stated that if certain modernization programs of ours are authorized, we intend to invest in the immediate future an additional six million dollars for new double-decker equipment with a view to attracting and retaining the suburban passengers for our services. This involves also the shortening 52 of schedules, and a program of that kind has been announced.

As to the meaning of "IDP", all modernization does not inevitably involve a reduction of jobs. One of the major problems that all railroads face, and the North Western with its obsolete system faced in particular, was methods of locating and knowing from minute to minute or

day to day the location of the more than 1,400,000 cars of revenue freight that we handle in a year. We have undertaken what we are confident is the most complete and modern program of its kind to provide the most modern mechanical communication techniques and methods for knowing the location from day to day, destination, origin and place on the railroad of these freight cars, with a view to being able to advise our shippers at any moment precisely where their car or load may be. This is going to cost us approximately \$1,200,000 a year. In this particular case, however, it actually creates jobs, rather than the immediate dislocation of jobs, and as a matter of fact,

53 happens to create additional jobs for the telegraphers.

That is the organization that is involved in this proceeding.

The condition of the North Western, in my opinion, lies in the critical need for the modernization of the North Western, bringing it into the middle of the Twentieth Century, and to a degree also the modernization of the railroad industry of which we are a part. I emphasize the North Western because it is what I am concerned with, and because we had lagged badly, but essentially it involves the application of modern techniques both within the industry that is known to other railroads, and borrowed from other industries, so as to compete with these other forms of transportation as well as other railroads, and to bring additional business to the railroads so that we can create jobs on a sound basis and not on a featherbedding basis.

54 My statements are in part based on a personal inspection of the physical property. Mr. Fitzpatrick, our president, and I have traveled over our entire system not once, but many times, over much of it, personally visiting the stations, including the one-man stations involved here and so forth.

The change in the manner of transportation and methods

of transportation—the transportation revolution—contributed to the problem of the North Western in particular because of the nature of the territory it serves. It has been essentially a short-haul railroad, and particularly 55 vulnerable to truck competition. In addition, the major lines parallel the Mississippi, so that it has been particularly vulnerable to river competition. The all-pervasive private automobile, with the highways which have been built to accommodate them, have provided major competition. However, it is my personal view that the railroads fundamentally in certain areas are and can be the most efficient transportation medium known providing the lowest possible rates to the public, provided that we operate them as efficiently as we know how.

As to the effect on the number of employees on the railroad of the programs which we instituted to correct these conditions, when we came to the property on April 1, 1956, there were 26,300 employees. At the last count we had 18,372 employees, so that the North Western today is operating with about 8,000 fewer employees doing the same volume of business, approximately, somewhat less. However, those employees and the remaining employees 56 are today receiving substantially higher compensation, so that although there has been a net reduction of the amount, as I have indicated, there has been by no means a comparable reduction in compensation, and as a matter of fact, the North Western's payrolls as of now, because of wage increases and the like, are some \$16,000,000 a year higher than they would have been had we had this number of men on April 1, 1956. The purpose of our program is not simply to eliminate or cut down the number of employees on the North Western.

57 The objective of the program is to place the North Western in particular in a position where it can compete with other forms of transportation and other rail-

roads who have done this over the past generation, thereby attract more business to the North Western, and thereby presumably provide more jobs, except on a sound and economic basis. As a matter of fact, many of these reductions in personnel are not net reductions in force, because the funds used from the elimination of wasteful practices are transferred to other personnel and other crafts for the laying of additional cross ties which the North Western needs very badly for the rehabilitation and rebuilding of the freight cars which our shippers of the North Western need. So that it is not necessarily a net reduction in force. It is an attempt to root out waste and transfer the dollars into places which will enable the North Western to do a better transportation job at a cheaper price.

As to the situation regarding station agencies in 1956, the North Western is one of the old railroads. It was laid out fundamentally in the '50s, '60s and early '70s of the last century. There were no hard roads; there were no automobiles; there were no telephones. In consequence, the stations were laid out at a distance—the stations which are occupied by the members of this craft, the telegraphers—were laid out at a distance of seven to eight miles apart.

The reason for their being laid out at such a short distance was that it was regarded at the time as approximately the distance that a farmer could carry a load of wheat by horse over dirt roads to the station, or a load of whatever he had, to place on the train and return.

Now there has been a transportation revolution just as thoroughly as there was with the diesel and steam engines. The hard road came in, and what was previously hours became minutes. The automobile had the same effect and the pickup truck. The telephone enabled customers to do business with the stations without the necessity for travelling to the station. The North Western had reduced their

force at many of these stations, but at many of them—I believe there were some five or six hundred of these stations originally when we came, as I recall—they had reduced force to what are known as one-man stations. That is to say stations where only one man was on duty, and obviously the force could not be reduced below one man, even though the work had fallen to considerably below an eight-hour day.

Studies were made at these stations. I might say that the passenger trains had disappeared from many of these stations. Many trains passed the stations at hours when

the agent was not on duty because of the requirements

60 of the telegraphers that no agent could report for duty

after 9:45 in the morning or whatever the particular hour might be, and the consequence of this was that we were in many instances paying a station agent a full day's pay for twelve minutes' work, fifteen minutes' work, half an hour's work each day, and in certain cases we were paying an agent as much as \$300.00 for every hour worked, whereas at the same time the North Western was starving for funds to put more ties and more equipment and the like into its system.

We formulated a program to meet this problem created by the one-man station agency. That is called the central agency program. As to what that plan was, under the laws

of the several states in which we operate, a railroad has no power to close or consolidate a station or withdraw an agency service without the permission of the state public service commission. We formulated a program which in effect recognized the existing technological change in the

transportation industry. After careful individual

61 study of each station we established what we call a central area station. If there are four stations in line, or maybe it is five, or maybe it is one in the middle, and in effect extend the periphery or the area or the service area

of the agent at that station, so that he could serve a larger territory, taking into account the hard road, the telephone and the automobile. As a matter of fact, although the original stations were laid out in miles geographically, they were actually laid out from a time standpoint. They were concerned not with miles, but with the length of time it would take to reach the station and return, and what we attempted to do was to bring into the twentieth century, as I have said, the conditions of today, the hard road, the automobile and the telephone, and reflect them in these station operations. So that the net effect of the program was where an agent in a central station could enlarge his territory and serve effectively the people, the shippers, in a larger area, we did so.

Now, we did not close the other stations, and this is a very important point. If you close the stations, you place them in what might be called or what is called your 62 prepaid tariffs. You deny to your shippers the usefulness of an open station, but we kept and keep those stations or associate stations as they are referred to in our own tariffs, so that the shipper, the customer, at each of these associate stations has, with certain exceptions, and not in connection with carload freight, the same advantages that he would have if the agent were there. Instead of calling the agent four blocks away by telephone, he calls him four miles away and our agent accepts the call on the required basis. Our agents go to the station by automobile, and we pay the mileage on the automobile, and in most cases he does this in a few minutes.

We are required by law to present a program of this sort to the commerce commissions or the public utility commissions of the various states. The North Western presented such petitions in South Dakota, Iowa, Minnesota and Wisconsin.

63 We filed the South Dakota case first on November 5, 1957. We filed the Minnesota case on January 24, 1958 and we also filed the Iowa station case. The commission felt that because of the public interest, the hearing should not be held just in the state capital, and accordingly, in Iowa, for example, hearings were held in Des Moines, the state capital, in Denison, Sioux City, Algoona, Cedar Rapids, and again at Des Moines, consuming 17 days of hearings without regard to oral argument and

64 the like. In South Dakota hearings were held at Pierre, the capital, at Rapid City and Huron, which were spread throughout the state, and there the hearings consumed 9 days. Those hearings have now been concluded.

An order has been entered by the South Dakota Public Utilities Commission. South Dakota took an unusual step. They entered an order not authorizing us to do what we asked, but finding that this was required in the public interest, and directing us to do it forthwith. That was not prayed for by us. That was apparently and entirely on the Commission's own motion, and that order was entered on May 13, 1958.

65 Plaintiff's Exhibit 2 for identification is a certified copy of the report, order and opinion of the Public Utilities Commission of the State of South Dakota. Exhibit 2-A is a certified copy of a further order and opinion denying rehearing.

I testified in the South Dakota case on December 19. The rule which the telegraphers had requested in this case was served on us on December 19 and 23.

67 (PLAINTIFF'S EXHIBITS 2 and 2-A were received in evidence.)

68 (At this point counsel read two paragraphs at page 10 of the findings of the South Dakota Commission:)

"We find: that the agent's work load as shown by statistics of record at subject stations varies from twelve

minutes per day at Farmer, to two hours per day at Oneida, with an average work load of fifty minutes per station at the sixty-nine subject stations;" "That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates, and that an order be forthwith issued that the proposed central agency plan be effectuated."

69 The Iowa Commerce Commission hearings have also been concluded. An order was entered in the Iowa hearings on August 11 of this year. That is just two weeks ago today.

70 Plaintiff's Exhibit 3 for identification is a certified copy of the order entered by the Iowa State Commerce Commission on August 11, 1958. That was the order which was entered on the central agency plan proceedings. Our petition was originally filed in that case on January 24, 1958.

(At this point PLAINTIFF'S EXHIBIT 3 for identification was received in evidence.)

71 (At this point counsel read several paragraphs from the findings and order of the Iowa Commission, Plaintiff's Exhibit 3, as follows:)

"We have given serious and thoughtful consideration to all phases of this problem knowing full well that it represents a change of magnitude and what it will have effect on many shippers and users of railroad service. We have also given consideration to the deteriorated financial condition of the railroad. This condition must be recognized. The problem of granting some relief has been before the National Congress. Savings must be made by reducing or eliminating service no longer needed. The case before

us is a proposal to reduce agency service to the level of actual need. It is not one of complete discontinuance. It is the intent, according to evidence, to use the resultant savings for betterments and improvements such as the upgrading of branch lines, purchase of new cars, repair of cars, so that they can be furnished to the shipper in better condition for loading and to otherwise better equip the railroad plant so as to insure efficiency, economy, and adequate rail transportation."

"Granting authority to the applicant, numbers 2 and 3 of its prayer to forthwith inaugurate and establish a central agency plan * * *

73 The positions with which these orders are concerned were filled by employees who belong to the Order of Railroad Telegraphers. Following the entry of the orders in these two states, the North Western Railroad placed the orders in effect as promptly as possible consistent with our contract obligations with the telegraphers. As to what I mean by "consistent with the contract obligations with the telegraphers", we placed the orders in effect promptly paying the men a severance amount.

74 As to what the Order of Railroad Telegraphers did regarding these two orders, in South Dakota they applied for a rehearing before the Public Utilities Commission. Simultaneously, they went into a South Dakota court, the Circuit Court of Minnehaha County, and obtained a restraining order on May 26. That restraining order was dissolved and the injunction proceedings by the Brotherhood dismissed by the court on June 26. That was a general equity proceeding.

South Dakota provides for a statutory appeal from orders of the South Dakota Commission, and on June 30 the Order of Railroad Telegraphers and certain other interested persons filed an appeal under that statute to

the Circuit Court of Minnehaha County, South Dakota, from the order of the South Dakota Commission. That latter proceeding is now pending.

75 As to the Iowa order, that was rendered on August

11. The appeal period is still running so far as I know and no further action has yet been taken. I am informed that the appeal time has not yet expired. We have put the central agency plan into operation in Iowa as well as South Dakota and they are in effect there at the present time. There was no court proceeding in Iowa enjoining or restraining it.

76 The first time at which the North Western had notice of a strike against it by the O. R. T. was last week some time. Plaintiff's Exhibit 4 for identification is a three-sheet telegram directed to Mr. Van Patten, who is our Director of Personnel and the highest officer on our railroad for labor purposes, from E. C. Thompson, Executive Secretary of the National Mediation Board. That

77 telegram is the first notice we had that the strike was being called. The date was August 14.

(PLAINTIFF'S EXHIBIT 4 for identification was admitted into evidence.)

80 (Counsel for plaintiff stated that the Exhibit 4 was being offered not for the truth of Mr. Leighty's allegations, but solely for the purpose of demonstrating the first strike notice which the railroad had. The court stated that counsel was entitled to offer it for that purpose.)

Prior to that time, the North Western had an inkling or suggestion that there might be a strike on the North Western. Plaintiff's Exhibit 5 for identification is a letter to all of the members of the Order of Railroad Telegraphers of the Chicago and North Western Railway 81 and its subsidiary, the Chicago, St. Paul, Minneapolis & Omaha Railway, dated July 10, and circulating a strike ballot. It was directed to the members of the

Brotherhood. I don't know exactly when the Railroad first saw this. It was sent to us by an agent some days later, but within probably a week or so after the date that it bears of July 10. By an "agent", I mean a station agent, a member of the Brotherhood.

82 (At this point PLAINTIFF'S EXHIBIT 5 was received in evidence, not for the purpose of the truth of the statements therein, but for a limited purpose.)

85 (At this point counsel read portions of Exhibit 5, the O. R. T. strike ballot :)

"Last fall a program of this sort that is of vital concern to our members was initiated by this management. The program is directed at the elimination of a vast majority of agents serving one man stations. Proceedings were begun before the Public Service Commissions of South Dakota, Minnesota, Iowa and Wisconsin, seeking authority either to close nearly all the one-man stations or to have one agent service two, three or four stations. Similar proceedings in other states may be expected momentarily."

86 (Counsel then read the proposed rule which was set out at the bottom of the first page of the exhibit :)

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the organization."

87 (Counsel then read the following additional paragraph from the exhibit :)

"While we hope the Commissions in other states will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota. In his testimony before the various State Commissions, Mr. Heineman has also said that further reductions are planned in all groups, and the

88 only manner in which we can properly protect the

employees we represent is through a positive rule in our agreements such as we have proposed. And the only way such a rule can be secured is by demonstrating our determination through strike action."

89 In addition to the strike ballots, parts of which were just read, the North Western came into possession of other documents concerning the possibility of a strike on the North Western. Plaintiff's Exhibit 6 for identification purports to be a communication from the Order of Railroad Telegraphers dated August 18, entitled, "Strike Call and Instructions Pertaining to Conduct 90 of the Strike". Now here again I don't recall whether the railroad received this on August 18 or 19. It is dated August 18 of this year. It was received very promptly after the date it bears. It was sent to us by one of the agents.

91 (At this point counsel for Plaintiff clarified the purpose for which he was offering Exhibits 5 and 6. He stated that he was offering them to show notice and the dates when the events occurred, and that he was also offering these documents as admissions on the part of the defendants in this case. The court stated that the various documents could also be considered as received in evidence for the purpose of admissions against interest. PLAINTIFF'S EXHIBIT 6 was then received in evidence also on this basis.)

94 (At this point counsel read several paragraphs from Plaintiff's Exhibit 6, The O. R. T. Strike Call:)

95 "Dear Sirs and Brothers:

"The Issues."

"On July 10, 1958 we submitted to the membership of the Chicago & North Western System a strike ballot seeking the views of the membership as to whether

a strike should be authorized, if necessary, to secure a satisfactory settlement of the dispute arising from our proposal to add to existing agreements the following rule:

'No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the organization.'"

The Minnesota proceeding on the central agency

96 plan is complete and awaiting decision of the Railroad and Warehouse Commission of the State of Minnesota. In the Wisconsin proceeding, all evidence has been taken, and briefs are yet to be filed, and I don't know whether oral argument is going to be permitted.

97 The proposed rule demanded of the North Western by the defendants was in the notice given under Section 6 of the Railway Labor Act on December 19 with reference to the Omaha Railroad and on December 23 with reference to the North Western Railroad.

The Mediation Board proffered its services, as indicated in Plaintiff's Exhibit 4. In that telegram, the Mediation Board requested a strike date deferment. The Mediation Board at the time also requested that plaintiff here defer action on the State Commission orders. Those orders had already been placed in effect, and we could not defer it in Iowa and South Dakota. South Dakota was several months earlier.

99 Plaintiff's Exhibit 7 for identification is a two-sheet telegram dated August 18, 1958 to Mr. Van Patten, Director of Personnel, Chicago and North Western Railway, from Mr. E. C. Thompson, Executive Secretary of the National Mediation Board. This was received by the North Western Railroad on the date it bears. It is part of the regular files and records of the Personnel Department of the railroad.

100 (At this point Plaintiff's Exhibit 7 for identification was received in evidence as PLAINTIFF'S EXHIBIT 7.)

101 (At this point counsel read Plaintiff's Exhibit 7.)

102 After receipt of this telegram the National Mediation Board had further proceedings concerning E-175.

The North Western accepted the proffer of services, as did Mr. Leighty. A mediator was appointed by the name of Wallace Rupp. He came to the North Western on August 19 at 2:30 in the afternoon and discussed the matter with our Director of Personnel, left and said that if there was any possibility of working the matter out, the North Western would hear from him before 10:00 o'clock in the morning on August 20. He stated he was going over to see representatives of the Order of Railway Telegraphers, Mr. Leighty, at the Congress Hotel, I believe. We did not hear from the mediator further directly. We did not hear directly from the mediator further.

A further communication was received from the National Mediation Board's Secretary. That communication is Plaintiff's Exhibit No. 8 for identification.

103 (Plaintiff's Exhibit 8 for identification was received in evidence as PLAINTIFF'S EXHIBIT 8.)

(At this point counsel read the telegram Exhibit 8:)

104 (Counsel stated that the telegram was received by the Personnel Department of the C. & N. W. Railroad on August 20, 1956 according to the telegram.)

This telegram was received by the North Western Railroad. I have personal knowledge of its receipt.

Well, I have personal knowledge of when it was received in the general offices of the Chicago and North Western. I do not have personal knowledge of when it was received in our communications office, which is manned by telegraphers of this craft. The telegram is dated the

19th. It was not delivered from our communications office to the general office until a day later, but I know when it came to the attention of the officers of the railroad, which was on the 20th.

(Exhibit 9 for identification was received in evidence as PLAINTIFF'S EXHIBIT 9.)

106 (At this point counsel read the telegram Exhibit 9, addressed to Mr. Van Patten, Director of Personnel, Chicago and North Western Railway Company, Chicago.)

In response to the statement contained in the telegram received from the National Mediation Board about the possibility of a further proffer of service, the plaintiff North Western Railway Company replied to that telegram. Plaintiff's Exhibit 10 for identification is that telegram.

107 (Plaintiff's Exhibit 10 for identification was received in evidence as PLAINTIFF'S EXHIBIT 10.)

(At this point counsel read the telegram Exhibit 10, which was from Mr. Van Patten to E. C. Thompson, Executive Secretary, National Mediation Board.)

"Your wire date re Case E-175. This carrier stands ready to cooperate with the Mediation Board in connection with this case at all times."

(The date that appears on the telegram is August 20 and the confirmation copy was received by the railroad on August 21.)

109 (At this point counsel asked the witness: "Would you please tell the Court what the North Western's position is regarding this proposed rule?" The Court sustained objection of counsel for defendants to the question.)

Yes, I testified that the O. R. T. had previously requested that rule. The North Western at no time agreed to 110 that rule. As to what our answer was to the Telegraphers' representatives, our Director of Personnel had been authorized to state two things to the telegraphers by Mr. Fitzpatrick or me jointly or severally:

1. That this particular rule was nonbargainable and that this carrier could not possibly, or in my opinion or that of any carrier, could not possibly acquiesce to it.

111 2. He was authorized to communicate to the Telegraphers that it was barred by the moratorium provisions of the agreement of November 1, 1956, and in due course notice was served that it was going to the National Railway Adjustment Board.

The nonbargainability issue was authorized shortly after receipt of the demand for the rule in December, 1957. Although the moratorium situation had been discussed many times, he was authorized to make that communication on Thursday, August 21, 1958.

113 When the December demand was received, the Director of Personnel, who presumably consulted with other departments of the railroad, recommended to Mr. Fitzpatrick and me that that be the response and that it was a proper response, and we acquiesced in it. I would like to modify my previous statement to that extent. I do not know if there is any difference. We adopted the recommendation. We are still responsible.

116 On Thursday, August 21, Mr. Van Patten was authorized to communicate the position of the North Western Railway to the Order of Telegraphers that the rule which they have demanded was barred by the moratorium provisions of the agreement with the non-ops of November 1, 1956.

On Friday morning, August 22, a submission was made of that issue to the National Railway Adjustment Board and we have today, I believe, received a communication from the National Railway Adjustment Board that that submission has been received or filed.

Plaintiff's Exhibit No. 11 for identification is a mimeographed copy of the submission that we made, including the exhibits.

120 To my knowledge, other railroads have submitted the very same question to the National Railway Adjustment Board as is involved in this submission by the North Western Railroad. An identical demand was
123 made by the Telegraphers of another railroad. When I say "Telegraphers", I mean the defendants in this case. There may have been a different freeze date than December 3, 1957. To restate my answer, another carrier has contended an identical demand made upon it with perhaps a different date appearing in it than the demand here, is barred by the moratorium and has been submitted to the National Railway Adjustment Board as an interpretation of an existing agreement, that is, the agreement of November 1, 1956. We learned of that last week. The railroad that I am referring to is the Minneapolis and St. Louis Railroad. The telegraphers have made other demands of other railroads and they are being processed.

I don't know where they are.

124 Plaintiff's Exhibit 12 for identification is the North Western Railroad's carbon copy of a communication dated August 22 from the National Railroad Adjustment Board to Mr. G. E. Leighty, president of The Order of Railroad Telegraphers. This has a stamp on it indicating receipt by the North Western on August 25.
125

126 (Plaintiff's Exhibit 12 for identification was received in evidence as PLAINTIFF'S EXHIBIT 12.)
(At this point counsel read part of the letter, Exhibit 12:)

"Written notice of intention to file ex parte submission within thirty days of August 22, 1958 has been received from Mr. T. M. Van Patten, director of personnel, Chicago & North Western Railway Company, in dispute involving, briefly and for identification purposes only, the following: 'That the notices served by the Order of Railway Telegraphers on the carrier

dated December 19, 1957 and December 23, 1957, are in contravention of Article VI of the Agreement of November 1, 1956.' "

Now, subsequently to the notice of intention, the submission was actually made.

128 In the Commission proceedings in Iowa and South Dakota, the O. R. T. adopted two positions: They first of all took the position that the men work longer hours than we said they did, and that public convenience and necessity required their continuance. That position the Commission expressly found contrary to their contentions. In addition, they took a position and argued that in any event we couldn't put the central agency plan into effect without their agreement under existing contracts, because they contended that a central agent under existing contracts would have to be paid a day's pay for each agent he relieved.

131 (At this point the Court sustained an objection by defendant's counsel to the previous answer by the witness, but permitted it to stand as an offer of proof under Rule 43.)

133 Steps were taken by the management of the North Western with regular certified, authorized railway unions to modify and ameliorate the economic consequences of lessened railroad employment. Non-operating

134 brotherhoods, other than the Telegraphers, who proportionately have been affected far greater, enter into an agreement with the North Western which we have characterized as a supplementary unemployment compensation agreement, whereby the North Western cushioned the effect of these programs so far as the non-operating brotherhoods other than the Telegraphers.

(At this point counsel for defendants asked that the portion of the answer which says that the other brotherhoods were affected more than the Telegraphers be stricken

as a conclusion, but the Court ruled that the answer
135 would stand as the witness' opinion.)

That agreement was reduced to writing. It was entered into by the various non-operating brotherhoods which I have described and the North Western Railroad. Plaintiff's Exhibit No. 13, entitled "Memorandum Agreement", is the agreement. It is entitled "Memorandum Agreement" between the Chicago and North Western Railway Company and certain non-operating labor organizations, Supplemental Unemployment Benefits, dated at Chicago, December 27, 1956, and entered into with the
136 following organizations: The Brotherhood of Railway & Steamship Clerks, the International Association of Machinists, the International Brotherhood of Boilermakers, the International Brotherhood of Electrical Workers, the Brotherhood of Railway Carmen of America, the Sheet Metal Workers, the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, the Brotherhood of Maintenance of Way Employees, the Joint Council of Dining car Employees Union, the United Transport Service Employees of America, the American Railway Supervisors' Association, the Railroad Yardmasters of America, and then comparable brotherhoods for the Omaha. I stated "North Western", but the
137 contract was both for the North Western and Omaha.

This agreement is still in effect.

The same agreement was offered to the O. R. T., the defendant in this case.

140 In the Fall of 1957, as I recall it, the director of personnel was engaged in conferences with the General Chairmen of the Order of Railroad Telegraphers and the Grand Lodge vice president. At that time he was authorized to state to them that the North Western Railroad was prepared to enter into a supplemental unemployment compensation agreement identical in terms to those

theretofore entered into with the other non-operating brotherhoods.

142 That offer provoked no response from the O. R. T.

They have never accepted this agreement. In the Fall of 1957 it was the position of the railroad that it would extend the identical terms to the O. R. T. It is still our position that we would extend identical terms to the O. R. T. on a retroactive basis to the same date set out in their rule.

143 (Plaintiff's Exhibit No. 13 for identification, the Supplemental Unemployment Benefits Agreement was received in evidence as PLAINTIFF'S EXHIBIT 13.)

144

Cross-Examination.

145 You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified, nor in my opinion can it be.

As to the conversation about which I testified to, in Madison in the corridors of the State Office Building on May 26, 1958, I did not indicate a willingness to confer on the merits of that particular rule, but the Order of Railroad

146 Telegraphers had always made clear in every document and every statement that they made, that the purpose of this rule was to protect them against state commission action, and what I was offering to do, and was trying to work out some method to cushion the shock to the extent that there was one on the members of the O. R. T., but on this particular rule, no, sir, I was not prepared to discuss it.

As to in what documents they made that clear, the strike ballot of July 10, and in the strike notice, and in a telegram to the Mediation Board, and theretofore in conversations. I am putting my interpretation on documents that are in evidence.

I indicated a willingness to talk about some means of cushioning the incidence of abolition of positions. In my opinion we have always had a responsibility in 147 that direction.

As to whether I indicated any willingness to discuss the maintenance or continued maintenance of positions, well, I have described the conversation. I said the door was open, and that I would be glad to discuss it. I did not make any proposal, as I said, my door was always open to you.

My recollection, Mr. Schoene, is that this conversation took place after I had been on the stand all morning, and my recollection is that it was the noon recess, but it could have been the afternoon recess. My recollection is the noon recess.

The conversation occurred not quite two weeks 148 subsequent to the order of the South Dakota Commission and the carriers' action with reference to it, and approximately three months before the Iowa Commission's action, and our action with reference to that.

As to whether I in any way suggested a willingness to consider modification of the action I had taken in South Dakota, neither you nor Mr. Leighty gave me the opportunity. I asked Mr. Leighty if he was interested in sitting down and trying to work this out and he turned to you and said, "What do you think?" You said, "We are too far apart." And I said, "All right, gentlemen, but I want you to know that my door is always open."

As to what I was referring to when I said "work this out", as a matter of fact, I was more specific. I said

"either on a South Dakota or a system basis". I said that much—either South Dakota or on a system basis.

149 As to whether what I had reference to was confined to the station closing programs and did not include other employees represented by the Order of Railroad Telegraphers, so far as I know, the Order of Railroad Telegraphers is not affected by any program of the North Western Railroad except the station closing at the present time, except favorably through the integrated data processing.

The notice of December, 1957, the proposed rule, would be forever applicable to all employees represented.

As to whether I meant to imply that the conversation at Madison was an offer to negotiate on the merits of the December, 1957, proposals, that conversation was an offer to bargain on the realities underlying the proposal, yes,

sir. They are as you have stated the realities to be in 150 your documents, and I might say that Mr. Elson also stated to the Court in that connection that no counter proposals had ever been received, and this was a feeler, and our conversation was designed to draw out further negotiations.

I do not believe that the carrier at any time before the commencement of this lawsuit asserted to the Order of Railroad Telegraphers that the proposal of December, 1957, was contrary to Article VI of the November 1, 1956, agreement. No such assertion was made to the National Mediation Board at any time as the dispute was still on the property. By "dispute", I am referring to the dispute over the rule requested by the O. R. T. which was still on the property. Hence, there was no occasion to specify the grounds. The Mediation Board enters the dispute when there is disagreement over it. The grounds have nothing to do with it. The moment the moratorium becomes relevant is when the dispute is going to leave the property and

is going to be submitted finally and irrevocably to the Adjustment Board, at which time all grounds must be stated; nor were the Telegraphers prejudiced in any way.

151 I believe I am familiar with the procedural requirements for the submission of disputes to a National Railroad Adjustment Board. I am familiar with the requirement of the statute that disputes referable to the Board shall be handled on the property in the regular manner up to and including the highest operating officer of the carrier.

As to whether the dispute as to the applicability of Article 6 of the 1956 agreement to the December, 1957, proposal was ever so handled on the property, it is the position of the carrier that the communication of August 21 to the General Chairman, with copies to Mr. Leighty, was the statement of the position of the carrier with reference to that dispute before it left the property, yes, sir.

152 I am certain that on submissions to the National Railway Adjustment Board, whether by the organization or by the carriers, the grounds are made as complete as possible under the law, because they are finally bound, once the dispute leaves the property. I might say in answer to your question that this may have been unusual in the lateness of the assertion of that position to the Telegraphers, but I might also say that being served on one day, and two days within a week, on one that there was going to be a strike, and the second day that there was going to be a strike, and second that the strike made it also unusual on this property.

As to the language I was referring to when I said that I was familiar with the procedure reading "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes", the dispute was handled in the regular manner, yes, sir.

153 As to whether my testimony is that the letter of August 18 to the General Chairman stating the position of the carrier and stating that it was our purpose to submit it to the National Railroad Adjustment Board, is the usual manner of handling such disputes on the property, that is not the dispute, and that is not the dispute referred to in the act. The dispute is whether or not the carrier will agree to the rule, and that dispute is handled in the regular course. The grounds for the refusal to handle are normally threshed out in conference. This item had been a matter of discussion on the property for some time, but, as I said, we are not either accustomed to getting a strike notice or a strike call in one week, and unusual tactics call for unusual responses.

154 The dispute submitted to the National Railroad Adjustment Board, of course, is whether the particular rule is barred by the moratorium of the November 1 agreement. That is the dispute that we submitted. That was submitted to the organization for the first time on August 21. I have been informed that that case was received and docketed by the Third Division, I may have been in error. I think my testimony went beyond the submission of the matter to the Adjustment Board. I believe I stated that we had received a letter indicating that it had been received. I think Exhibit 12 is the letter I was referring to. It does not refer to docketing.

155 156 I am generally familiar with the proceedings in the nature of an injunction suit brought by the O. R. T. in Minnehaha County, South Dakota. The document you have shown me entitled "Return on Order to Show Cause and Motion to Dismiss" appears to be the response filed by the Public Service Commission of South Dakota in that proceeding. I have never read it.

158 (At this point defendants' counsel offered DEFENDANTS' EXHIBIT NO. 17 into evidence and the

exhibit was received in evidence over objections of counsel for plaintiff.)

160 The agreement identified and admitted as Plaintiff's Exhibit 13 was in settlement of a pending dispute. There were various demands by various organizations. I am sure that notices had been served under Section 6 that gave rise to those disputes. I recall one of those 161 notices. There may have been certain organizations who later asked for the benefits of the agreement, and were given it without ever having filed a Section 6 notice, but the principal organizations or several of them had filed a notice. The agreement grew out of that, and other organizations asked and received the benefits of the agreement, and the demand was for every man separated or furloughed, that we give him one year's severance pay at his last salary for every year in which he had been in the service of the railroad.

As to whether we regarded that as a bargainable subject under the Railway Labor Act, we regarded severance pay as bargainable. That was quite different from your demand.

162 One of the conditions of the agreement is that none of the organizations signatory may progress any stabilization of employment proposal for three years from May 6, 1956, as I recall it. The yardmasters have signified a desire to cancel their participation in the agreement.

165 Our response was that in view of the provisions of the concluding paragraphs of the agreement, which I believe is in evidence as Exhibit 13, that we could not entertain the request to cancel the agreement.

166 The paragraph of the agreement I was referring to is:

"The purpose of this agreement is to alleviate undue hardship for the interim period, or until the Railroad Unemployment Insurance Act is revised or amended

within that period. Therefore, this agreement is not subject to change or modification during such three-year period."

It is my understanding that the carrier is standing on that provision to refuse to agree to the cancellation of the participation of the Railroad Yardmasters of America.

167 As to whether we have an agreement with the Order of Railroad Telegraphers providing for severance pay or separation allowances, the agreement provides, as I understand it, what notice must be given to the men and what payment made. Now, I do not know that —(the witness was interrupted at this point.) The agreement simply provides that the employee affected is entitled to two days' notice in case of abolition of his position. We did not close them out without notice and pay them the two days' pay in lieu of the notice. What we did was, effective with the order, we enlarged the central area station. As to the men in the associate stations, we notified them and paid them two days' pay in our view in accordance with the agreement. We closed the station and relieved them of work on the same day. We gave them two days' notice and paid them for two days without working.

168 Going back again to the conversation which I testified as having been had with Mr. Leighty in the corridor of the State Office Building in Madison on May 26, 1958, the National Mediation Board was actively handling the dispute on that date. As to whether the mediator had some meetings with the parties on May 26, we would not necessarily know if he held meetings with the other party.

He did not meet with the North Western on that date.

169 He did not meet with the North Western on the previous day. My notes indicate that the mediator met with the North Western on May 22, four days earlier. My definite understanding is that he did not again meet with the North Western. My recollection is that the services

of the Mediation Board were not terminated until June 16.

Arbitration was proffered on May 27 and declined by the organization on May 28, and by the carrier on June 12.

As to who was representing the carrier in the mediation conferences, Mr. Van Patten, our director of personnel, is the top officer of the carrier for that purpose.

Mr. McGowan, our general counsel, was with Mr. Van Patten at that conference. I was not present.

I did not instruct Mr. Van Patten or Mr. McGowan to indicate to the mediator that even though I was not agreeable to bargaining on the specific proposal made by the Order of Railroad Telegraphers, that we would be agreeable to anything on some sort of counter-proposal such as I said I had in mind when I spoke to Mr. Leighty and you in the corridor in Madison. I do not know whether Mr. Van Patten or Mr. McGowan ever gave such indication to the mediator. I do know that on a subsequent occasion they did, but I don't know whether they did on that occasion.

171 They did make such an indication while it was in mediation. That was on August 19 in mediation file E-175, and I am not excluding the prior times. I simply don't know of them. Such an indication was given on August 19 in mediation file E-175.

The North Western Railroad is a member of the Association of Western Railways. It was represented by the Western Carriers' Conference Committee in the negotiation of the November 1, 1956 agreement with the non-operating organizations. I am not familiar with the document on the letterhead of the association dated November 9, 1956 and identified as Circular No. 772-11.

To the best of my knowledge I have never seen the document. As to whether or not I knew that such a paper existed, I did not know whether or not such a paper

173 existed, but I had been informed that there was some such understanding. As a matter of fact, I had been informed that it was oral. As to whether I knew about the understanding described in the document. I had been informed many months later of the understanding, and I was informed that the understandings were oral. I
174 was so informed within the last ten days. I had that information at the time I authorized the submission that is in evidence here as Exhibit No. 11.

175

Redirect Examination.

176 Plaintiff's Exhibit 14 for identification is a letter dated August 25, 1958 addressed to Mr. Van Patten, director of personnel of the C. & N. W. Railway Company, from the executive secretary of the Third Division of the National Railroad Adjustment Board. Plaintiff's Exhibit 15 for identification is a letter addressed to Mr. Van Patten from the Third Division of the National Railroad Adjustment Board, dated August 26, 1958. Those letters have been received by the North Western Railroad.

178 (Plaintiff's Exhibit 14 for identification was introduced in evidence as PLAINTIFF'S EXHIBIT 14.)

179 (Plaintiff's Exhibit 15 for identification was received in evidence as PLAINTIFF'S EXHIBIT 15.)

180 (At this point counsel read the following from Plaintiff's Exhibit 15:)

"This is to certify that by letter dated August 22, 1958, the Chicago and North Western Railway Company filed with the Third Division, National Railroad Adjustment Board, fifteen copies of Carriers' Ex Parte submission involving the dispute."

181 As to the question I was asked about whether this proceeding had been submitted or docketed, I confess that the distinction between docketing and submission is something I only learned last night. The submission has

been filed, and I erroneously termed it "docketing". Under their rules they do not "docket" the proceeding until both sides have made their submission. I am correcting the statement I made yesterday. I should have said "filed".

183 I have now available a transcript of the proceedings before the South Dakota and Iowa Commissions.

193 (At this point counsel for defendants objected to the reading by the witness of any of the said transcripts. Counsel for defendants, Mr. Schoene, stated, among other things:

"We have contended, and still maintain, although entirely apart from any issue in this case, that under our existing agreements the railroad has no right to assign an agent to work at several stations in the course of one day for a single day's pay. Now, no claims have been filed or handled on the property over any such controversy.")

194 (Mr. Schoene further stated:

"No grievances have been processed, no claims have been filed, no disputes have been handled on the property over any such difference of opinion, and, of course, none have been submitted to the National Railroad Adjustment Board.")

203 Turning to the transcript of the testimony of Mr. George E. Leighty, president of the O. R. T., given on January 17, 1958, at Rapid City, South Dakota, in

204 the proceedings before the Public Utilities Commission concerning the central agency plan, Mr. Lester Schoene, at page 2019, asked the following questions and Mr. Leighty made the following answers:

"Q. Now, Mr. Leighty, will you just indicate to the Commission the particular rules in Exhibit No. 78, which is the agreement between the North Western and the O.R.T., and in Exhibit 79, which is the agreement 205 between the Omaha Railroad and the O.R.T., which

are responsible for the condition in which the establishment of this so-called central agency plan would require the agreement with the Order of Railroad Telegraphers."

"A. Insofar as the Chicago and North Western Railway Company is concerned, it is found on page 45 and is headed 'Basic Day in One-Shift Offices'.

"(a) Except as provided in Section (b) of this rule either eight consecutive hours work exclusive of the meal hour, or eight consecutive hours work with no allowance for meals will constitute a day for one-shift positions. An assignment with no allowance for meals may be changed to one including a meal hour, or vice versa, only on issuance of a new time table, and then only as provided in Rule 50."

"Rule 50 requires that 48 hours' notice be given.

206 Now in addition to that the schedules which comprise one hundred and some odd pages, periodically the carrier furnishes the General Chairman with the list of positions within the scope of the Telegraphers' agreement. There is a provision in the agreement that positions will be classified in accordance with the work, and any agent or operator's position that is established will be placed in the agreement. Now this basic day rule has been interpreted on the property, and by the Adjustment Board on other railroads where the local interpretation was not agreed upon to mean that the basic day of work must be performed at one location."

Now, on page 2022 Mr. Leighty continued:

"On the Omaha Railroad, that is the yellow booklet, we find it on page 41:

"48. Eight consecutive hours, exclusive of the meal period, shall constitute a day's work, ex-

207

cept that where two or more shifts are worked eight consecutive hours with no allowance for meals, shall constitute a day's work. On shifts of eight consecutive hours, time will be allowed in which to eat without reduction in pay when the nature of the work permits.)

"Now on page 41, at the bottom of the page, they did have some trouble years ago on the Omaha, on the subject of taking off positions, and with respect to trying to have one man handle two positions. In Rule 47: '47. Regularly assigned employees will receive one day's pay within each twenty-four hours according to position occupied or to which entitled if ready for service and not used or if required on duty less than the required minimum number of hours as per location except on rest days and holidays. This rule shall not apply in cases of reduction of forces, nor where traffic is interrupted or suspended by conditions not within the control of the railway company.' For example, in cases of a washout or something of that kind, and the line is out of commission for a period of time, it is permissible to lay off the regularly assigned employee without paying him his guarantee. That is practically the only application of the exception."

Turning to the transcript of the statements made on June 25, 1958, at Sioux Falls, South Dakota, by Mr. Schoene, general counsel of the O.R.T., before the Circuit Court of Minnehaha County in the case "*Order of Railroad Telegraphers v. The Chicago and North Western Railway Company*", at page 4 of the transcript, Mr. Schoene's argument reads as follows:

"In the proceedings before the Commission on the aforesaid petition, the witnesses for the railroad company testified that the problems to the feasibility

of inaugurating a central agency program lay in the
209 fact that under the collective bargaining agreements
with the organization it was not permitted to assign
an agent to perform service at more than one station
in a day unless the organization agreed to such an
assignment, and if such assignment were made without
such agreement, that the agent so assigned would
be entitled to a day's pay for each station for which
he rendered service. This testimony correctly stated
the established interpretation and application of said
agreements, and this was confirmed by the testimony
of the president of the organization. Now that para-
graph in the complaint is controverted by affidavits
filed by the railroad company in which it is now stated
that the most the testimony of its representatives before
the Commission would establish was that the or-
ganization claimed its contracts so to provide."

At the bottom of page 10 Mr. Schoene, after some other argument, said this:

"So the situation which we have or are confronted
210 with is one in which the railroad, not on account of
any dispute as to the meaning of application of the
agreement but by reason of the purported authority
of the Public Utilities Commission of this state, has
simply abrogated and treated as a nullity the provi-
sions of the collective bargaining agreement with this
organization. Now that, we say, is contrary to the
provisions of the Railway Labor Act."

Turning to the statement of Mr. Schoene on July
211 2, 1958, at Des Moines, Iowa, in his argument before
the Iowa State Commerce Commission concerning the
central agency program, at page 2622, Mr. Schoene said:

"Now, in these proceedings the carrier has been, I
think, somewhat reticent about stating what the prob-

lem of feasibility is in putting this central agency plan into effect. In earlier proceedings it had made quite clear that the problem of feasibility revolved around its agreements with the Order of Railroad Telegraphers, and under the existing agreement it was not permitted to assign a telegrapher to work at more than one station in one day without first coming to an amendatory agreement with the Order of Railroad Telegraphers. Apparently the management has now altered its position somewhat in respect to the matter of agreements. Its conduct and attitude would indicate it is prepared to challenge the meaning and application of the agreements as they have been recognized and applied for many years in the past. The fact that it has apparently seen fit to make that challenge, of course, does not dispose of the problem. The Order of Railroad Telegraphers still adheres to the meaning and recognizes the application of these agreements and does not intend lightly to permit this carrier to abrogate and nullify the agreements that have been in effect for many years."

As to whether or not I did in fact change my position, I did not.

213 As to whether at any time in advance of my meeting with Mr. Leighty in Madison, Wisconsin, I talked with anyone and told them that I was going to talk to Mr. Leighty, Mr. McGowan and Mr. Van Patten were to be our conferees with the mediator, which conference took place on May 22, 1958. For perhaps a week or ten days prior to that meeting, we had discussed the feasibility and desirability of my opening up the matter of bargaining on this general problem with Mr. Leighty, and we had agreed that I would open the matter up with Mr. Leighty at the first opportunity, and we assumed that the first opportunity would be Madison at the hearings, because

Mr. Leighty had been in attendance at all of the hearings other than the Minnesota meeting.

214 From a factual, actual operating standpoint, the North Western Railroad cannot adopt the rule for which the O. R. T. is contending and carry out the order of the South Dakota Commission.

215 (The Court sustained an objection to this answer but the Court permitted the question and answer to stand as an offer of proof under Rule 43.)

From a practical, factual operating standpoint, the North Western Railway Company could not accept the rule contended for by the O. R. T. and furnish reasonable and adequate transportation facilities.

(The Court sustained an objection to the answer by defendants but the Court permitted the question and answer to stand as an offer of proof under Rule 43.).

216 If the rule were accepted, the North Western could not furnish adequate car service.

(Counsel for defendants objected to the answer but the Court permitted the question and answer to stand as an offer of proof under Rule 43.).

As to whether the rule could be accepted by the North Western and carry out other Commission orders both now in existence and as may be in the future entered by State Commissions, well, I can't quite answer that because presumably the Commission could make some future orders which would have nothing to do with the subject matter at all, so I can't answer that question.

217 As to whether we have ever received any lesser demand from the Brotherhood than the rule which they are requesting which has been set out in the exhibits, the organization has never indicated to the North Western Railroad, directly or indirectly, that it would accept anything less than the rule that it is demanding here.

As to whether or not it is true that my door is always

open as I testified yesterday that I had advised Mr. Leighty, that is still true.

218 If the rule contended for here by the Brotherhood were accepted by the Railroad, the North Western Railroad would not be able to comply with Commission orders permitting or directing line abandonments, and we just had one.

(Counsel for defendants objected to the answer but the Court permitted the question and answer to stand as an offer of proof under Rule 43.)

219 G. E. LEIGHTY, called as a witness on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

Direct Examination.

My name is G. E. Leighty. My address is 3860 Lindell Boulevard, St. Louis 8, Missouri. I am president of The Order of Railroad Telegraphers. That is the chief executive office of that organization. It is part of the responsibility of that office to approve or disapprove of proposed contract revisions that various system committees may wish to negotiate or propose.

220 On or shortly prior to December 23, 1957 I approved a proposed contract revision which the general chairman of the Chicago and North Western Railway wished to serve on that property. At approximately the same time, I approved an identical proposal which the union chairman on the Omaha Railroad wished to serve on the North Western management. Defendants' Exhibit 1 for identification is a duplicate original of that notice so approved by me, bearing the signature of the general chairman. It indicates that it was received by the Chicago

and North Western Railway Company on December 23, 1957.

221-223 (Defendants' Exhibit 1 for identification was received in evidence as DEFENDANTS' EXHIBIT 1 and read.)

As to what, if anything, had occurred on the Chicago and North Western Railroad prior to the serving of 224 this notice which caused me to approve the service of such a proposal, there has been a change in the management of the Chicago and North Western System. There had been a general slaughter of positions. I mean of jobs. There had also been a consolidation between Omaha and the North Western. Our organization had lost a number of jobs already.

225 The incidents or occurrences that I have described extend to and affect all classes of employees represented by the Order of Railroad Telegraphers. Based on our membership survey, approximately one hundred positions had been eliminated other than in the station agent positions.

Defendants' Exhibit 2 for identification is a letter dated December 24, 1957 on Chicago and North Western Railway Company stationery, showing Mr. T. M. Van Patten 226 as director of personnel, and Mr. H. R. Beisel, assistant director of personnel, addressed to Mr. R. B. Boyington, 1703 Daily News Building, 400 West Madison Street, Chicago 6, Illinois. Mr. Boyington is the General Chairman of our organization on the North Western Railway, although that designation is not shown in the address of the letter. It is signed by Mr. T. M. Van Patten, acknowledging receipt of a letter of December 23, 1957.

It is a signed copy.

227-229 (Defendants' Exhibit 2 for identification was received in evidence as DEFENDANTS' EXHIBIT 2 and read.)

I was informed as to the proposed meeting on January 17, 1958. I assigned a vice president to participate 230 in the discussions, said that the notice was a stabilization of employment notice, that such notices were permissible and it was a bargainable subject under the Railway Labor Act.

(Plaintiff moved that the answer be stricken as not responsive to the question and as being in part a legal argument. The Court overruled the objection.)

I assigned Vice President V. N. Kinkead to accompany Mr. Boyington, General Chairman on the North Western, and General Chairman Schuler of the Omaha to the 231 conference. That conference dealt with both the notice that had been served on the North Western and on the Omaha with both General Chairman and Vice President 232 Kinkead participating. The representatives of our organization did not accept Mr. Van Patten's premise that the matter of our notice was not bargainable.

233 Defendants' Exhibit 3 is a letter dated January 21, 1958 addressed to Mr. Boyington and signed by Mr. T. M. Van Patten. It is a signed document.

234-235 (Defendants' Exhibit 3 for identification was received in evidence as DEFENDANTS' EXHIBIT 3 and read.)

A similar letter was received by the general chairman of the Omaha.

236 Mr. Boyington and Mr. Schueler made a reply to 237 that letter. That reply was made in accordance with my instructions and the replies were in substance identical. Defendants' Exhibit 4 is the reply made by Mr. Boyington.

(Counsel for defendants offered Defendants' Exhibit 4 for identification in evidence. Counsel for plaintiff objected to the admission in evidence of such a document to

prove the statements contained in them, stating that the statements were self-serving and that there was no opportunity for cross-examination of the document. The Court said that all of these letters were introduced to show the correspondence which took place concerning this matter and received the exhibit in evidence as DEFENDANTS' EXHIBIT 4.)

239-240 (The exhibit was then read.)

Thereafter I invoked the services of the National Mediation Board under the Railway Labor Act with respect to this dispute.

241 Defendants' Exhibits 5 and 6 are, respectively, the letter to the National Mediation Board covering the invocation of mediatory services and the formal application form itself. The letter to Mr. E. C. Thompson is dated February 5, 1958, and the regular form application for mediation services is dated February 5, 1958. To that application for mediation services is attached a copy of the notice which we served upon Mr. Van Patten on December 23, 1957.

(Counsel for plaintiff objected to Exhibit 5 for the reason that it was written neither by the North Western nor to the North Western, but by Mr. Leighty to the Mediation Board. Plaintiff's counsel objected that the exhibit was not part of the correspondence between the two disputing parties and was not binding upon the plaintiff and was simply self-serving and could not be cross-examined upon. The Court overruled the objection, stating that the exhibit is a part of the process showing what was done. DEFENDANTS' EXHIBITS 5, 6 and 6-A, the latter being the letter which was attached to Exhibit 6, were received in evidence.)

243 Like action was taken with respect to the disputes under the Omaha agreement, but at a later date.

Defendants' Exhibit 7 for identification is the copy fur-

nished to me by the National Mediation Board of its letter to Mr. Van Patten as a result of my invocation of the services of the Board. It is dated February 10, 1958. It solicits a statement that Mr. Van Patten might wish to make on my invocation of the services of the Board.

244 (Defendants' Exhibit 7 for identification was received in evidence as DEFENDANTS' EXHIBIT 7.)

Defendants' Exhibit 7-A is apparently a reply made by Mr. Van Patten of the North Western Railroad to the letter of February 10 addressed to him by Executive Secretary Thompson of the National Mediation Board. I was not furnished with a copy of that letter.

245-248 (Exhibit 7-A was then read.)

Thereafter the National Mediation Board wrote a joint letter to me and to Mr. Van Patten. Defendants' Exhibit 8 for identification is the copy sent to me.

249-251. (Defendants' Exhibit 8 for identification was received in evidence as DEFENDANTS' EXHIBIT 8 and read.)

Defendants' Exhibit 9 for identification is a copy furnished to me by the National Mediation Board of a letter addressed to Mr. T. M. Van Patten under date of March 7, 1958, and transmitting therewith a copy of a letter addressed by to the Board in response to the letter I have just read as Exhibit No. 8.

Exhibit 9-A for identification is a copy of the letter I wrote to the National Mediation Board in response to the letter I have read as Exhibit 8.

252 (Defendants' Exhibit 9 for identification was received in evidence as DEFENDANTS' EXHIBIT 9; Counsel for plaintiff objected to Exhibit 9-A for the reason that the letter was from Mr. Leighty to Mr. Thompson and one not sent by plaintiff, and one, therefore, that could not be binding upon plaintiff. Counsel for plain-

253 tiff further objected that it was self-serving and hearsay. The Court received DEFENDANTS' EXHIBIT

9-A in evidence for the purpose of showing that it was sent and that, of course, the Mediation Board was informed of its contents. The Court noted that all such letters were admitted to show that they were sent and that as to the truth or veracity, that didn't matter. The Court stated that the contents of any of these letters might not be true and they might be shown to be untrue.)

254-257 (Exhibits 9 and 9-A were then read.)

The National Mediation Board thereafter endeavored to mediate the dispute. The mediator assigned to that task was Mr. Rupp. Vice President B. N. Kinkead represented the organization in the conferences. He kept in touch with me and reported to me as to what was occurring in the conferences. The mediatorial efforts of the Board continued for several days.

Defendants' Exhibit 10 for identification is a copy of the letter mailed to me addressed to Mr. B. N. Kinkead 259 and Mr. Van Patten by Mediator Rupp.

(Defendants' Exhibit 10 for identification was received in evidence as DEFENDANTS' EXHIBIT 10 and read.)

261 Defendants' Exhibit 11 for identification is the copy furnished to me by the National Mediation Board of the letter from Mr. Van Patten to Mr. Rupp under date of June 12, 1958.

(Defendants' Exhibit 11 for identification was received in evidence as DEFENDANTS' EXHIBIT 11 and read.)

Defendants' Exhibit 12 for identification is a letter addressed by the Executive Secretary of the National Mediation Board jointly to me and Mr. Van Patten under date of June 16, 1958.

264-266 (Defendants' Exhibit 12 for identification was received in evidence as DEFENDANTS' EXHIBIT 12 and read.)

That letter would appear to indicate that the organization had declined the proffer of arbitration on May 267

28. Defendants' Exhibit 12-A is the letter written to me and Mr. Van Patten by Mr. Thompson, executive secretary, National Mediation Board, upon the expiration of the thirty-day period referred to in the letter of June 16. The date of that letter is June 16, 1958 in case A-5696.

(Defendants' Exhibit 12-A for identification was 268-269 received in evidence as DEFENDANTS' EXHIBIT 12-A and read.)

In the meantime, I had acknowledged receipt of Mr. Thompson's letter of June 16. That is Defendants' Exhibit 13 for identification.

(Defendants' Exhibit 13 for identification was received in evidence as DEFENDANTS' EXHIBIT 13.)

270 Thereafter I either prepared or supervised the preparation of the strike ballot to be distributed to the employees I represent on the Chicago and North Western Railway and the Chicago, St. Paul, Minneapolis and Omaha portion thereof, seeking the views of the members as to whether they would authorize a strike if necessary to secure a satisfactory settlement of the proposed notice that had been served in December of 1957. That was under date of July 10, 1958. Plaintiff's Exhibit No. 5 is the strike ballot I have just referred to. It is the strike circular and the official strike ballot. It was distributed to all employees I represent on the Chicago and North Western Railroad, including the former Chicago, St. Paul, Minneapolis and Omaha branch.

272 (DEFENDANTS' EXHIBIT 14 for identification which was identical to Plaintiff's Exhibit 5 was received in evidence, not for the truth of the statements therein, but to show what was submitted to the employees in the form of information on the strike ballot.)

273 Under the constitution and by-laws of the Order of Railroad Telegraphers, this strike ballot was not a necessary condition precedent to my authorizing a strike. Under the constitution of our organization each railroad is divided into local divisions. The members of a local division elect by ballot a local chairman. Those local chairmen constitute the general committee and are the governing authority on that system's division. They have the authority to order a strike by a two-thirds vote of that general committee, with the approval of the president.

274 As to why the strike ballot procedure was followed, the general committee voted unanimously for the strike

275 because of the seriousness of the issues involved. We wanted to get an expression from our membership because a strike is a very serious matter. An overwhelming majority of the members voted in favor of the strike.

Thereafter I issued a letter under date of August 18 jointly with the representatives of the General Committees on the two properties, the North Western and the Omaha, under date of August 18, 1958, which constitutes a strike call and instructions pertaining to the conduct of the strike.

Plaintiff's Exhibit 6 is a correct copy of the strike call 276 and instructions to which I have just referred. This call and instructions were sent to all officers and members of the North Western. I don't believe the railroad was given a copy or notice of it, although several officers of the railroad undoubtedly received it because they are members of our organization.

277 (DEFENDANTS' EXHIBIT 15 for identification, being identical to Plaintiff's Exhibit 6, was received in evidence not for the truth of the statements therein, but only to show what was done.)

In this letter I make the statement, "The vote on the strike ballot was almost unanimous in favor of a 278-280 strike". That is a correct statement. (The exhibit was then read in part.)

I notified the National Mediation Board on August 14 that we were setting a strike date and we notified the National Mediation Board on August 19 that a strike date had actually been set. After my notification to the Board on August 14, the Board again sought to resolve the dispute through proffering its mediatory services on an emergency basis. I personally met with the mediator in the course of those efforts. There was no indication given 281 to me at that time that the representatives of the management were agreeable to negotiating something along the line that Mr. Heineman described this morning.

I would like to say at this time that what occurs in mediation proceedings is usually considered to be of 283 a confidential nature. The mediator reported to us that the position of the carrier was adamant, that they had nothing to offer. Thereafter I received a telegram from the National Mediation Board informing me that they had been unsuccessful in resolving the dispute.

Defendants' Exhibit 16 for identification is the telegram to which I have just referred.

(DEFENDANTS' EXHIBIT 16 for identification 284 was received in evidence and read.)

On August 22, 1958, Mr. R. C. Williamson gave me 289 a copy of the letter he had received that date from Mr. 290 T. M. Van Patten. Mr. Williamson is the General Chairman of the Order of Railroad Telegraphers on the Chicago and North Western Railroad. He succeeded Mr. Boyington; who retired in February of this year.

Defendants' Exhibit A for identification is the letter furnished me by Mr. Williamson on August 22.

291. (DEFENDANTS' EXHIBIT A for identification was received in evidence.)

Defendants' Exhibit A is on the stationery of the Chicago and North Western Railway Company, addressed to Mr. R. C. Williamson, 1703 Daily News Building, 400

West Madison Street, Chicago 6, Illinois, dated August 21, 1958. The letter states:

"Dear Sir:

Please refer to former General Chairman R. B. Boyington's letter of December 23, 1957, serving a formal notice on the Chicago and North Western Railway of the desire of the General Committee of the O. R. T. to amend the current agreement by adding the provision:

292 "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization."

"Even though it is still our position that such provision does not in fact constitute a proper subject for a Section 6 notice on which carriers and representatives of employees are required to exercise every reasonable effort to reach agreement under the Railway Labor Act, it is also our position that your notice of December 23, 1957 is barred under the provisions of Article VI of the agreement, effective November 1, 1956, between this and numerous other carriers and the O. R. T. and certain other non-operating railway labor organizations with which I am sure you are entirely familiar. Our basis for this position that your notice is barred by Article VI is as outlined in the attached 293 memorandum. It is therefore our purpose to submit this question to the Third Division, National Railroad Adjustment Board for determination.

Yours truly,

T. M. Van Patten."

294 Prior to the time that Mr. Williamson gave me that copy of that letter, I had never heard of there being any contention on the part of the plaintiff that the notice of December 23, 1957 was barred by the November 1, 1956 agreement. I have kept in close touch with my representatives handling that dispute through its progress. They at

no time reported to me any indication that such a contention had been made. After Mr. Williamson presented me with that letter, I instructed him as to what reply he should make. DEFENDANTS' EXHIBIT B for identification is a copy of the reply that Mr. Williamson made.

295 (To the offer in evidence of the exhibit, counsel for plaintiff objected to its admission in the evidence for the reason that it is self-serving and is merely an argument. Counsel for defendants stated it was not offered to be binding on the plaintiff, but to show the position of the organization. The document so offered was received in evidence. The Court stated that there were many letters which may be admitted in evidence which may or may not be true, but were not admitted for the truth, but to show that such statements and such representations were made by one side to the other in order that the Court may have before it a true perspective of what has gone on between the parties. The Court stated that it was admitted for that purpose and not necessarily for the truth of the statements therein contained.)

Defendants' Exhibit B is from The Order of Railroad Telegraphers, Chicago and North Western, System Division No. 76, under date of August 22, 1958, and is addressed to Mr. T. M. Van Patten, Director of Personnel, Chicago and North Western Company. It reads:

"Dear Sir:

"This will acknowledge receipt of your letter of 297 August 21, 1958, stating that it is your purpose to submit to the Third Division, National Railroad Adjustment Board, a question as to whether our Section 6 Notice of December 23, 1957 is barred by Article VI of the Agreement of November 1, 1956.

"The Agreement of November 1, 1956 is a Mediation Agreement reached through mediation under the provisions

of the Railway Labor Act in Case A-5256. The question you now raise for the first time seeks to raise a controversy over the meaning or application of Article VI of said agreement. In case of any such controversy, Section 5, Second of the Railway Labor Act authorizes either party to the agreement to apply to the National Mediation Board for an interpretation of the meaning or application. In docketing the dispute arising under our December 25, 1957 notice the National Mediation Board held that a proper Section 6 Notice had been served.

298 "The question you now raise is not referable to the National Railroad Adjustment Board not only because of the specific primarily jurisdiction of the National Mediation Board over the interpretation of mediation agreements, but also because it does not fall within the statutory jurisdiction of the Adjustment Board. Section 5, First (i) of the Railway Labor Act permits reference to the Adjustment Board only of disputes 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.'

299 Article VI of the Agreement of November 1, 1956, although contained in an agreement other parts of which concerns rates of pay, rules or working conditions, does not itself concern rates of pay, rules or working conditions within the meaning of Section 5, First (i). You have heretofore recognized this to be true and have not handled the question on the property in the usual manner for handling disputes referable to the Adjustment Board as the law requires prior to such disputes being referred to the Board.

Very truly yours,

R. C. Williamson"

300 Defendants' C for identification is a copy of the agreement dated November 1, 1956 between railroads represented by the Eastern, Western and Southeastern

Carriers' Conference Committee and the employees of such railroads represented by the Employees' National Conference Committee; eleven cooperating railway labor organizations. That document contains as its Article VI the Article VI referred to in Mr. Van Patten's letter Exhibit A and in Mr. Williamson's letter Exhibit B. That exhibit is not the entire agreement.

302 (EXHIBIT C was received in evidence in order to show what Article VI is.)

303 The Order of Railroad Telegraphers is a party to that agreement. Both the Chicago and North Western Railway and the Chicago, St. Paul, Minneapolis and Omaha Railroad are parties to the agreement. The Western Carriers' Conference Committee represented those railroads in negotiation of this agreement. The Employees' National Conference Committee represented The Order of Railroad Telegraphers. I was chairman of the Employees' National Conference Committee. Article VI of that agreement, Exhibit C, reads as follows:

“Article VI. Duration of Agreement.

“The purpose of this agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no Carrier or Organization, party to this Agreement, will serve any notice or progress any pending notice to—

“(a) Increase or decrease rates of pay established by Articles I, II, III and IV of the Agreement.

“(b) Increase or decrease the rate of compensation provided in existing agreements, or eliminate or establish agreements providing the rate of compensation, covering overtime payments, arbitrary payments, Sunday or Holiday payments, time paid for but not worked, or increase

or decrease the number of paid Holiday or paid vacation days.

"(c) Increase or decrease the amount of payments required to be made by the agreement of December 21, 1955, and Article V of this agreement for hospital, medical and surgical benefits for the employees and their dependents.

"(d) This Article VI does not prevent adjustments 305 under normal processes on the individual carriers in the rates of pay of individual positions; correction of inequities as between rates or individual positions on a particular railroad; or negotiation of rates for new positions or positions where the duties or responsibilities have been or are changed. This Article VI will not debar management and committees on individual railroads from agreeing on any subject of mutual interest.

306 "(e) This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment, separation allowances or other matters not prohibited by the foregoing provisions of this Article VI."

Defendants' Exhibit 18, which is on the letterhead of The Association of Western Railways and is identified as Circular No. 772-11, is a document which was given to me by Mr. Welch, the executive secretary of the Association of Western Railroads. It was furnished to me for information as chairman of the Employees' National Conference Committee.

(DEFENDANTS' EXHIBIT 18 for identification was received in evidence.)

307 Defendants' Exhibit 18, dated November 9, 1956 reads as follows:

"Circular No. 272-11.

"Chief Operating Officers Western Railways:
(Represented by Western Carriers Conference Committee)

"Referring to our Circular No. 772-9 of November 1, 1956 transmitting copies of Agreement of that date
308 between the Carriers represented by the Eastern, Western and Southeastern Carriers Conference Committees, and their employees represented by the Eleven Cooperating Railway Labor Organizations:

"The Carriers Conference Committee and the Employees' National Conference Committee have entered into an understanding that controversies over the meaning or the application of the November 1, 1956 Agreement which are not settled on the individual properties will be referred to the Committees signatory to the Agreement for disposition.
309 It was agreed that instructions to that effect would be issued by the three regional bureaus to the railroads parties to the Agreement, and by the Employees' National Conference Committee to the respective General Chairmen of the Eleven Cooperating Railway Labor Organizations on the individual carriers.

"The understanding contemplates that if the Committees signatory to the Agreement are unable to resolve the question, such Committees will then endeavor to agree upon a method for final disposition of the dispute. If the Committees can neither resolve the question, nor agree upon a method for final disposition, it has been agreed that Section 5, Second of the Railway Labor Act will then be invoked. Section 5, Second reads as follows:

'In any case in which a controversy arises over the meaning or the application of any agreement reached

310 through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing on both sides, give its interpretation within thirty days.'

"Accordingly, any controversy arising on your railroad concerning the meaning or application of the agreement of November 1, 1956, which you are unable to settle on the property should be submitted to the undersigned by letter (please furnish 30 copies thereof) containing all of the pertinent facts, for handling by the Carriers' Conference Committee and the Employees' National Conference Committee, Eleven Cooperating Railway Labor Organizations, pursuant to the understanding herein outlined.

311 Yours very truly, R. F. Welch, Executive Secretary"

I have continued to function as chairman of the Employees' National Conference Committee since November 1, 1956. In that capacity I have participated in the functions of the joint committees referred to in the circular that I have just read. To my knowledge, the Chicago and North Western Railroad Company has not submitted to that committee any controversy or contention as to the applicability of Article VI of the November 1, 1956 Agreement to my proposal of December 23, 1957. I can say definitely that the Employees' National Conference Committee has never received any such reference of any dispute to this Committee or any request that such dispute—

312 The Committee was in session through August 22, 1958. We were in session all last week. We were in session when this suit was begun and at least up to that time there had been no receipt of any claim by those committees.

Referring to Mr. Heineman's testimony as to the conversation he said he had with me in the corridor of the State Office Building in Madison, Wisconsin, on May 26, 1958, during the course of the hearing before the examiner of that Commission in Madison, Mr. Heineman asked me if I could see him briefly. He asked me if I could see him at recess or at some convenient time for a moment or two. I told him I would be glad to, and at either the recess in the morning or at the noon recess, I am not positive 313 which, Mr. Schoene and I met with Mr. Heineman and Mr. Fitzpatrick, who is president of the North Western. At that time the railroad had already put in the order of the South Dakota Public Utilities Commission. Mr. Heineman asked me if I thought any good purpose would be served by he and I meeting and discussing the agency situation, either with respect to South Dakota or with respect to the system-wide basis. I said that at that time I did not feel that any good purpose would be served. I then turned to our counsel and asked him what his opinion was. He stated, "I think we are too far apart."

315 As to whether I recall specifically Mr. Heineman's remarks to the effect that the door was always open, I recall that he made that remark, yes, sir. As to whether he said, "I will discuss this specific problem concerning the system-wide and the South Dakota problem," no, he did not say that. He said, "The door is always open." Now, just what he meant by that, I don't know. I could only give you my conclusion of what he meant. As to whether immediately prior to that, he discussed with me or asked me something to the effect that there was anything

I could discuss regarding those two particular problems, yes, he did. He said, "Would any purpose be served by a discussion?" That statement was limited 317 to agencies, too, to the agency and also to the South Dakota problem or on a system-wide basis. Those two

problems he indicated or asked me if there would be any good purpose served, or something to that effect.

As to whether I said we were too far apart on those particular problems, no, I said that I did not think any good purpose would be served at that time. And my counsel then said, I turned to him and said, "What do you think about it, Mr. Schoene?" And he replied, "No, I think we are too far apart." Now that is my best recollection of what the conversation was.

As to the general proposition on this proposed rule, we never discussed it personally, to my recollection, on that or any other occasion.

318 My conclusion as to the effect of his conversation was that he said, "The door is open, but I won't discuss that rule." He would discuss the particular situations.

So far as the proposal of December 23, 1957 is concerned, that was in mediation and being actively handled in mediation on that very day. Mr. Kinkead, our vice president, was representing me, and Mr. Van Patten was representing the railroad.

319 The document marked for identification as Defendants' Exhibit 19 is a copy of the agreement between the Chicago and North Western Railway Company and the Order of Railroad Telegraphers, effective April 1, 1950, and the document identified as Defendants' Exhibit 20 is the agreement between the Chicago, St. Paul, Minneapolis and Omaha Railway Company and the Order of Railroad Telegraphers, effective March 1, 1956. They are the latest printed booklets. However, with respect to both documents, a number of supplemental national agreements have been entered into, to which both the North Western and Omaha are parties, which are not included in those documents. The agreement of November 1, 1956 would be an example of the kind of national agreements that I am referring to,

insofar as the Omaha is concerned, and all the national agreements entered into since 1950 would not be in 320 the North Western booklet because it was published in 1950. Health and welfare, improved vacation, wage increases on several occasions, the union shop rule and several other items that were contained in the 1953-54 agreements are the sort of subject matters that have been dealt with in the national agreements since 1950. These are the over-all basic agreements which have been supplemented by various other ones since that time. These show the methods by which amendments may be made to provide for all those contingencies.

321 (DEFENDANTS' EXHIBITS 19 AND 20 for identification were received in evidence.)

I have been an officer in my organization continuously since 1924. I was local chairman from 1924 until 322 1942. From 1924 to 1937 I also worked a position on the railroad in addition to being local chairman. In 1937 to 1939 I was a deputy president of our International Organization. From 1939 to 1942 I was general chairman of the Order of Railroad Telegraphers on the Milwaukee Railroad. From 1942 to 1946 I was first vice president of the International Organization, and since 1946 I have been president of the International Organization. I have also served as chairman of the Railroad Labor Executives

Association since 1950. It is an association of the 323 chief executives of the various standard railway labor organizations. Its purpose is to discuss and take common action upon the problems of mutual interest. I have served as chairman of the several successive Employees' National Conference Committees of the non-operating railway labor organizations since 1947.

(At this point counsel asked, "In the course of your consultation with the chief executives of the other organizations, have you had an occasion to become familiar to a

substantial degree with the nature of the agreement proposals they are progressing on various railroads?" Counsel for plaintiff objected to this question and similar such questions as being irrelevant to the issues in the case. The Court gave counsel for plaintiff a standing objection to this line of questioning, but overruled such objections and permitted the witness to answer such questions.)

324 I am familiar with such proposals. I have become familiar with proposals or agreements in effect concerning stabilization of employment. The first agreement that I have in mind was the agreement that was entered 325 into back in the '20s. The agreement of the shop crafts on the Seaboard Air Line is what I was referring to.

326 (At this point counsel for plaintiff again stated his objection. The Court said the witness was getting far afield, but it was not harmful and certainly won't be binding in any manner, and that the witness may answer for that purpose.)

As to the Seaboard agreement, the organization and the carrier originally met in September or October of the preceding year, now it is in December, to agree upon a minimum force of positions for the ensuing year. That agreement has been carried forward from year to year. It provides that the railroad will not employ less than a certain number of people. It so happens that in 1957 the number was identical, 1,646 for each year, 1957 and 327 1958. There are some savings clauses provided in the agreement, but it is an agreement which in effect does stabilize the employment for that group on that property by guaranteeing a certain number of positions throughout the year.

(Counsel for plaintiff again renewed his standing objection and further stated that the agreements should be presented or offered rather than having the witness summarize them so that counsel for plaintiff could state his

objection as to the materiality and relevancy and competency. The Court overruled the objections.)

329 I know of other stabilization of employment agreements collectively bargained in the railroad industry: The Railway Yardmasters of America and the Chicago, Great Western Railway; the Railway Yardmasters of

330 America and the Missouri-Kansas-Texas Railway.

The Brotherhood of Railway and Steamship Clerks and the Boston & Maine Railway; the Southern Railroad and practically all of the standard organizations on that property, are both currently bargaining on the subject matter. The proposals there being bargained are in the nature of a guarantee of some minimum employment probably. I probably overlooked the non-operating group on the M-K-T in this connection. They are bargaining, too, on that issue. There are several other issues involved in their notice. This issue is particularly involved.

332 *Cross-Examination.*

As to whether it is a fact that the Organization has taken the position that the memorandum which is Exhibit 18 does not apply in those areas that our Organization has termed "Stabilization of Employment", the memorandum insofar as the disputes committee is concerned, we contend does not apply in those areas because the agreement, Article VI; is so clear on that issue.

333 (Counsel for plaintiff asked whether the Organization had taken that position in a letter or letters signed by Mr. Leighty. Counsel for defendants objected. Counsel for plaintiff asked, "Isn't it a fact that you have taken that position in a letter signed by you?" Counsel for defendants objected again and the Court sustained the objection.)

335 In some of our conferences we did take a position similar to that, and then we outlined our exact position

in our letter of July 18, 1958 to the three chairmen of the Carriers' Conference Committees. It is a four-page letter. That was with relation to three specific claims that were before our committees. Insofar as the maintenance of way organization is concerned, it involved practically all of the Class I rail carriers in the United States. Insofar as the Boston and Maine Railroad is concerned, it involved the clerks on that property. The other one was with respect to the telegraphers on the Minneapolis and St. Louis Railway. I think in an issue of that kind, there was a dispute that arose on those three issues and the carriers' committee took one position and we took another one, and we had a lot of discussions and contentions to each other in the course of those discussions. Our final position is outlined in our letter of July 18.

337 (PLAINTIFF'S EXHIBIT 16 for identification, the letter of July 18 referred to, was received in evidence. Counsel for plaintiff stated that he was offering it as an admission against interest.)

339 I did not mention having this identical rule up for consideration with the B&M or the Southern Railroad. Practically an identical rule is up for consideration with the M&StL. As to whether there is any difference in the rules at all, I would have to compare the two rules before I can tell you. We probably have a thousand rules up for presentation on various properties. If you ask me to remember all of those rules, it is just an impossibility. To the best of my knowledge, it is a very similar rule and it is certainly designed to be the same as much as possible.

340 That question has been submitted to the National Railway Adjustment Board by the M&StL. As to whether the M&StL in that submission took the same position as the North Western Railroad has taken, I have not seen the M&StL submission. They have thirty days within

which to furnish their submission to the National Railroad Adjustment Board, and I have not seen their submission.

341. As to whether I mean that I did not know what position the M&StL had taken regarding this rule, I have a report in my office with respect to the position that was taken by our conferees, but I would have to refer to that report to give you a definite answer because, as I said before, we have many, many rules in progress of negotiation on various railroads, and until I refresh my memory I couldn't give you an honest answer to those questions, and I am under oath, and I intend to do that. I do not know what position the M&StL took before the Railway Adjustment Board on this rule.

342. I testified, based on our membership records, that approximately 100 positions have been discontinued on the North Western Railway. That would not include resignations and voluntary withdrawals and reduction of numbers. As to what positions were abolished in this number of positions I have described, to my personal knowledge, I know that a number of second trick positions were abolished. As to whether there are any other positions which I had in mind when I testified to this diminished number of positions beside the second and third trick agency positions, it is my understanding that there has been a reduction in forces during that period in the yard offices, and also in the offices which we commonly call "relay" offices.

I could not give you any specific locations or positions during that period of time where there had been a reduction of forces. As to whether I can give even one location, oh, I do know that in the testimony of your own witnesses in South Dakota, they testified that the second trick positions had been abolished at a number of stations that were

now one-man stations, but I couldn't recall the names
344 of those stations. As to whether that occurred before
or after 1956, I would assume that that happened after
1956. I would have to go to the records and other people
would get it.

As to the lease combining the Omaha and North Western
and their operation as a single system, it is my under-
345 standing that that lease was approved by an Interstate
Commerce Commission order. To a certain degree,
that Commission's order includes in its terms provisions
to take care of the dislocation of employment that might
result. As to just what the degree was, I might say that
several hundreds of those orders come out every year,
various kinds, and some of them are quite lengthy, and if
I attempted to read all of that material—

346 (PLAINTIFF'S EXHIBIT 17, the order and report
of the Interstate Commerce Commission concerning the
lease of the Omaha Railroad by the Chicago and North
Western Railroad as of January 1, 1957 was received in
evidence.)

349 As to whether it is a fact that my organization agreed
350 to the entry of this order, there again I would have to
check our records on it. There are hundreds of those
orders coming out every year and some of them we oppose
and some of them we agree to. Whether this is one that we
agreed to or opposed, I couldn't say. We also have what is
known as the Washington Job Protection Agreement that
has some influence in connection with positions in consolida-
tions of this kind.

The order, Plaintiff's Exhibit 17, reads in part as fol-
lows:

351 "The period during which this protection is to be
given, hereinafter called the Protected Period, shall
extend from the date on which the employee was displaced,
to the expiration of four years from the effective date of

our order herein, provided, however, that such protection shall not continue for a longer period following the effective date of our order herein, and the period during which such employee was in the employ of the Carriers prior to the effective date of our order."

In other words, if he had been employed two years, it would be limited to two years, and not more than four years, he would be entitled to four years.

352 (At this point the Court asked whether any such provisions as referred to were also included in the findings of the South Dakota or Iowa Commissions. Mr. Schoene stated that there were no such conditions.)

354 I met with the mediator personally during mediation E-175. That mediator was Mr. Rupp. I only met with him once personally on the afternoon of August 19, late in the afternoon, probably four o'clock, at the Congress Hotel. Mr. Kinkead, our vice president, and Mr. Schoene were also there. That is all.

The mediator said the railroad was adamant and 355 that the railroad had not changed its position and had no proposal to offer. As to whether the mediator himself made any suggestion to me as to a basis on which an agreement of some sort might be reached, no, he did not.

As to whether he made any suggestions as to a possible basis on which an agreement might be reached, well, we had considerable discussion with respect to what had transpired, and I cannot recall that there was any indication given by him that the North Western—I am positive that he said that the North Western had nothing to offer, and I think he said they had inquired if we wanted to modify our proposal, but as I said before, we were in a room there for probably thirty minutes and there was considerable discussion. I cannot recall everything that was said. I do not

356 recollect that the mediator himself suggested any possible basis on which an agreement might be worked out.

I do not remember any suggestion from Mr. Rupp as to a basis of solving the dispute. I don't believe that it is possible such a suggestion was made and I don't remember it.

357 In Defendants' Exhibit 10 the National Mediation Board proffered arbitration in its letter of May 27, 1958. Defendants' Exhibit 11 is a letter of the North Western Railway Company declining arbitration, dated June 12. Before the North Western declined arbitration, our Organization had already declined arbitration. As to whether there is really an exhibit missing between 358 10 and 11, to keep the whole story intact, I think it was testified that we declined to arbitrate.

(At this point counsel for plaintiff asked, "Mr. Leighty, you were present yesterday and Monday when your attorneys, Mr. Schoene and Mr. Elson, stated, I believe, to the Court that there was no connection between the South Dakota and Iowa Commission orders and the strike ballot, strike call and strike, didn't you, sir?" Counsel for 359 defendant stated, "Well, I made a statement several times, your Honor. I made it yesterday, as a matter of fact, that this notice was served in order to meet situations such as arose in South Dakota and Iowa, and that actually, as this witness testified to earlier, there were one hundred positions abolished even before the rule was served. But we don't say that there was no connection at all. We simply say that the rule which gave rise to the strike was designed to meet this kind of a situation."

360 Counsel for defendants stated that he conceded that that notice was served to meet this kind of a situation, and that there was a connection between the South Dakota and Iowa orders and the strike to the extent he had indicated.)

361 As to whether it is a fact that the petition was filed with the Public Utilities Commission of South Dakota

on November 5, 1957, and that the first demand for this rule was served December 19, 1957, the request for the rule was made subsequent to the filing of your petition in South Dakota, that is correct. The rule had been under consideration for several months previous to that time. As to whether it also was served or requested or demanded after hearings had already been held in the South Dakota case at Pierre, South Dakota, and after the petition had been filed in Minnesota, the dates will speak for themselves. I don't recall all those dates.

362 Referring to Plaintiff's Exhibit 6, it is not correct that I either wrote or approved that document. I either wrote or supervised the writing of it. I signed it and am familiar with its contents. I, in fact, approve of them.

As to whether those two orders would have accelerated my action in connection with this proceeding, well, if you mean the filing of the notice, now, when they served notice and made application to the South Dakota Commission asking for this, very frankly, we didn't believe the South Dakota Commission would ever go along with anything of that kind. As to whether it accelerated the strike situation, well, the notice was served long before the strike 363 action was taken. As to whether the demand for the adoption of the rule accelerated it, well, the rule was 364 originally demanded or requested in December. The order of the Commission didn't come out until May, some five months later, and the action of the South Dakota Commission wouldn't necessarily make it more evident how important a rule of that kind was.

I supervised the preparation of the strike ballot of July 10, 1958 and I was definitely familiar with its contents. Plaintiff's Exhibit 5 reads in part as follows:

365 "Last fall a program of this sort that is of vital concern to our members was initiated by this management. This program was directed at the elimination

of the vast majority of agents serving one-man stations. Proceedings were begun before the Public Service Commissions of South Dakota, Minnesota, Iowa and Wisconsin, seeking authority either to close nearly all of the one-man stations or to have one agent serve two, three or four stations. Similar proceedings in other states may be expected momentarily."

I testified in the Commission hearings in South Dakota.

I testified in Iowa to a limited degree. Mr. Schoene 366 represented us at some of those hearings, and Mr.

Griffith, another one of our vice presidents, represented us at some of those other hearings. We have appealed from the South Dakota Commission, but at 367 this time have not appealed from the Iowa Commission order. I don't believe that the time has expired to appeal the Iowa Commission order.

In addition to the appeal from the South Dakota order, our organization instituted a suit requesting a temporary restraining order in Minnehaha County. The restraining order was obtained relating to the South Dakota proceedings. I think that the court eventually denied an injunction.

369 As to whether another railroad presented to the Minnesota Commission a program extending the territory of the station agents, it was not a similar program 370 as it was limited to one agent serving two stations.

To that extent it is similar to the North Western Central Agency. I want to change that answer because in those cases the carrier proposed to continue all of the services at each station and curtail the number of hours that were involved. Here your application and the order granted you by the Commission permits you to discontinue less carload service at the station, and the sale of tickets and the handling of express, and the handling of telegrams, and only carload shipments are handled at those stations,

and it differs considerably from your Central Area Agency plan. In general, I would say that that plan represented 371 a lesser change than does the North Western's plan.

An order was issued by the Minnesota Commission concerning the plan. It denied the application with respect to certain stations and certain stations it permitted it, and at certain stations it took it under advisement. As to the stations where it was permitted, that order was challenged in court by our attorney. That challenge was successful so that no part of that program went into effect.

373 The requested rule which I served on December 19, if that rule were put in effect, it would mean that the railroad could not abolish the position of an agent at a one-man station agency without the agreement or permission of the union.

(Counsel for plaintiff then asked the witness, "And that would be true, would it not, that the railroad would have to get the approval of the union before it could abolish the position of an agent at a one-man station, even though all of the trains on that line had been abandoned and no trains passed the station?" Counsel for defendants objected that the question was argumentative and the Court sustained the objection.)

374 As to whether before the strike call was issued I knew that the supplemental unemployment benefits which were the subject of an agreement between the railroad and many of the other non-operating brotherhoods were available to our Organization, I had not 375 been so informed. To my knowledge, no other representative of our Organization had been informed. As to whether I knew they were available or had an opinion that I could secure them if that would dispose of the dispute, well, I presume that if we had been willing to dispose of this dispute by the totally inadequate provisions

of that agreement, in my opinion, that we possibly could have secured it.

377 As to whether I certainly knew from listening to Mr. Heineman's testimony that the same terms of that agreement were available to me retroactively, Mr. Heineman so testified on the stand and I heard his testimony.

378 Referring to the proposed rule "No position in existence on November 3, 1957 will be abolished or discontinued except by agreement between the Carrier and the Organization," as to whether our organization ever offered to the plaintiff, the North Western Railroad any lesser demand than is embodied in that rule, the carrier has refused to discuss the rule with it, and the normal process of collective bargaining had not progressed because of that.

(At this point the Court asked the following questions and the witness made the following answer:

The Court: "Well, answer, Mr. Witness, whether you have ever written them or told some of them, 'Come on, fellows, we will reduce our offer.' Have you ever made such a statement?"

The Witness: "In connection with this rule, no."

The Court: "Well, that takes care of the point.")

380 Subject to the qualifications of my previous answer, the only alternative which up to the present I have offered the North Western Railroad was to comply with this rule or strike.

381 A time slip is a claim for pay that the employee files, and usually in some of them—in most of our positions—it is a slip that must be sent in each day showing what hours the individual worked and what pay he is entitled to. That is a part of the usual and regular procedure on railroads. It is the common method on most railroads. I think the North Western has some circum-

stances under which a report or payroll is made up, when time slips are not required, according to my understanding. I think your non-telegraph agencies have a semi-monthly payroll form that they use and inasmuch as they are not covered by the hours of service of law, that suffices. That is to get their regular salary, the regular monthly payment or bi-monthly payment.

In addition to the regular amount which a man may be paid, these time slips can be used to state a claim for additional compensation, and they can also be stated in a claim made by the general chairman or local chairman. The use of time slips is one of the methods in which a man can make a claim for additional compensation that he feels he is entitled to. If the railroad agrees with him, of course, he eventually gets paid.

As to the procedure that then follows if the railroad does not agree, well, the case is handled by the local chairman, usually with a higher officer of the carrier in an attempt to secure payment, and then it is appealed on up to the, if payment is still declined, highest operating officer of the carrier. That is the normal procedure. Then the highest operating officer of the carrier is the last person on the property before that problem would be presented in the normal course of events. What we are talking about is on the property. Normally, if an agreement is not reached, the next step is to submit the question to the Railway Adjustment Board, but not necessarily. Either party may submit it or it may be submitted jointly.

As to whether it is my position at this time that the already existing collective bargaining agreements between the Organization and the North Western Railroad require the North Western to bargain with my Organization before the Central Agency Plan can be put into effect in South Dakota, before it can begin, I don't believe there is any rule in the agreement that specifically

provides for certain negotiations, but in the interest of labor-management relations, certain of the organizations should have been consulted in any program of that kind.

388 I never suggested to the mediator a demand less than the rule as stated in Plaintiff's Exhibits 5 and 6.

392

Redirect Examination.

397 Defendants' Exhibits 21, 22 and 23 are copies of documents that were attached to the originals of the letter of July 18, 1958, which is Plaintiff's Exhibit 16, when it was sent to the Chairmen of the respective Carrier Conference Committees.

398 (DEFENDANTS' EXHIBITS 21, 22 AND 23 for identification were received in evidence.)

These three documents are the decisions proposed by the Employees' National Conference Committee to the Carriers' Conference Committees in the Brotherhood of Maintenance of Way case with respect to stabilization; the decision proposed in the Brotherhood of Railway and Steamship Clerks case on the Boston & Maine Railroad with respect to stabilization, and the decision proposed by the Committee on the Order of Railway Telegraphers case on the Minneapolis & St. Louis Railway dealing with stabilization.

399 Prior to the preparation of those proposed decisions, the railroads, parties to the several disputes that I have indicated the proposed decisions were related to, had submitted to the Carriers' Conference Committees disputes concerning the application of Article VI of the November 1, 1956 agreement. They were submitted in conformity with the instructions of that circular identified as Defendants' Exhibit 18.

The members of the Employees' National Conference Committee considered the question of whether in their judg-

ment those particular rule change proposals involved in the disputes were or were not barred by Article VI 401 of the November, 1956 agreement. After such consideration, Defendants' Exhibits 21, 22 and 23 were prepared as the proposed decisions of the Employees' 402 National Conference Committee. They were discussed with members of the Carriers' Conference Committee and argument produced as to why they should be the decision of the joint committees. Except for the identification of the dispute, the proposed decision in each of the three cases is identical.

403. One of the exhibits referred to reads as follows:

"Article VI, Paragraph E of November 1, 1956 agreement excludes proposals on that subject from any restriction upon serving or progressing of notices pursuant to the Railway Labor Act for the negotiation of agreements pertaining thereto.

"Proposals of this character give rise to no dispute for resolution by the Carriers Conference Committees and the Employees National Conference Committee."

404. In presenting this decision on these proposed decisions to the Carriers' Conference Committee, the Employees' National Conference Committee contended that Paragraph E of Article VI of the November 1, 1956 agreement so clearly excluded proposals relating to stabilization of employment from any restriction under that agreement that no problem of interpretation was presented.

(Counsel for plaintiff objected to the above answer, but the Court stated that it was purely the witness' opinion and he would let it stand.)

405. It was explained to the members of the Carriers' Conference Committee that it was for that reason that the last sentence of that proposed decision was included.

(Counsel for plaintiff objected that the witness was 406 attempting to characterize and draw legal conclusions

and give explanations and motivations for drawing up the language of the proposed decision, and that this was improper. The Court denied the motion to strike the answer.)

408 The members of the Carriers' Conference Committee did not agree to the proposed decisions that the Employees' National Conference Committee proposed. They submitted to the Employees' National Conference Committee the proposed decisions which they suggested for adoption by letter. My letter of July 18 was in 409 reply to that letter. (Page 3 of that letter, Plaintiff's Exhibit 16, was then read.)

The procedures of the Railway Labor Act mentioned in the letter had reference to Section 5.

Concerning the position that the Minneapolis and 414 St. Louis Railway had taken in a certain submission to the National Railway Adjustment Board, I have received in my office the customary letter of intention to submit a dispute which normally is used to inaugurate proceedings before the Third Division of the National Railroad Adjustment Board. That includes a statement of the claim submitted.

(At this point counsel for defendants asked the witness about the substance of the claim and counsel for plaintiff objected that the witness had previously stated he had no idea what the claims were. The objection was overruled.)

The statement of claim in substance is that the carrier claims that a proposed rules change substantially identical to that pending on the Chicago North Western Railroad is barred by Article VI of the November 1, 1956 agreement.

416 We have challenged the jurisdiction of the National Railroad Board of Adjustment to hear this case on substantially the same basis as outlined in Mr. Williamson's letter to Mr. Van Patten of August 22, 1958, Exhibit B.

417 B. N. KINKEAD, a witness called in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination.

My name is B. N. Kinkead. My residence is 1641 19th Street, Parkersburg, West Virginia. I am first vice president of The Order of Railroad Telegraphers. I was assigned by President Leighty to represent the organizations in the effort to negotiate the proposed rule on the Chicago and North Western Railroad which has been discussed 418 here as having been served on December 19 and 23, 1957. In my representation of the organization in the initial conference I was accompanied by General Chairman Boyington and Mr. Schueler.

The initial conferences commenced at 2:00 p. m. on January 17, 1958 pursuant to the letter that Mr. Van Patten had written to the general chairmen, a copy of which is in evidence as Defendants' Exhibit No. 2. On January 17 we stated our position at the outset that we were not meeting Mr. Van Patten on the basis of his letter, but were willing to discuss the matter. We thought it was a proper 419 notice under Section 6 of the Railway Labor Act, but Mr. Van Patten did not agree to that. He reiterated his position as contained in the letter you have just referred to. At one juncture Mr. Van Patten remarked that we were pikers as compared with another organization that had served a similar notice, because that other organization had requested a retroactive date as of the effective date of its agreement, while our request was for the date of December 3, 1957. That other organization to which reference was made was the Railroad Yardmasters of America. That conference ended without any discussion of the merits of our proposal.

420 The next occasion I had to deal with the progress of this proposal was on May 22, 1958 when I was instructed to handle the matter in mediation with Mediator Rupp. He had been assigned as mediator pursuant to the invitation of mediation by President Leighty and handled the matter from May 22 until the afternoon of May 26, 1958. The mediator met separately with us on the one hand and representatives of the carrier on the other. There was no joint meeting with any management representative. The handling of the matter consisted of a series of meetings with Mr. Rupp.

421 Referring to my notes of these conferences, we met with the mediator on May 23 and May 26. I talked with him on the telephone on at least two occasions in addition to the two meetings in the hotel on May 23 and May 26, 1958.

422 Neither at the meeting with Mr. Van Patten on January 17, 1958 nor my meetings with the mediator at any time up until August 22, 1958 did I ever hear any intimation of a contention on the part of the Chicago North Western Railroad that this proposal was barred by Article VI of the November 1, 1956 agreement. At no time over that period did I receive any information or indication that the railroad was agreeable to discussing the merits of the proposal.

Cross-Examination.

Mr. Leighty did not report to me the conversation up at Madison. As to whether I recall in the meeting in August whether or not the mediator suggested any 423 avenue of approach to a possible settlement, no, he did not.

424 K. G. SCHOCH, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination.

My name is K. G. Schoch, 537 South Dearborn Street, Chicago 5, Illinois. I am president of the Railroad Yardmasters of America. That is not the Railroad Yardmasters of North America.

425 Defendants' Exhibit 24 is a copy of an agreement which the Railroad Yardmasters of America has made with the Chicago Great Western Railway Company.

(Counsel for plaintiff objected to the offer of Defendants' Exhibit 24 for identification on the grounds that it was totally irrelevant and immaterial and incompetent to prove anything on the issues in the instant case, that the exhibit concerned two parties which were not parties in this proceeding, that the proposal in the agreement identified as Exhibit 24 was not substantially the same as made with the contract proposal with the North 429 Western Railroad. Counsel further objected that all the exhibit could show was that another railroad had been willing to sign such an agreement and that was all; that it could not even show a concession by another railroad as to bargainability as there may have been many other reasons for which that railroad would have been willing to sign the agreement and waive their objections to the nonbargainability. Counsel stated that one

430 of the main reasons why the agreement is not similar is because it says, "carrier agrees to maintain during period provided in Article 3 of the agreement of May 3, 1957, the yardmaster positions assigned to date." Counsel stated that that is for a fixed and limited period which

was not stated. The Court admitted Defendants' 432 Exhibit 24 for identification in evidence. The Court

stated that plaintiff's objections to the exhibit would stand to all questions on the exhibit and that line of questioning.)

Defendants' Exhibit 24 reads in part as follows:

"Carrier agrees to maintain during the period provided in Article 3 of the agreement of May 3, 1957 433 the yardmaster positions assigned as of the date of this agreement, unless business conditions justify further reductions—in which event the carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effective."

Defendants' Exhibit 25 for identification is a copy of the mediation agreement between the Railroad Yardmasters of America and the Missouri-Kansas-Texas Lines.

(Counsel for plaintiff made the same objections to this exhibit as to the previous exhibit. These objections were overruled and the exhibit was received in evidence as DEFENDANTS' EXHIBIT 25.)

434 Paragraph 3 of Defendants' Exhibit 25 reads as follows:

"Carrier agrees to maintain during the period provided in Article 3 of the agreement of May 3, 1957 the yardmaster positions assigned as of the date of this agreement, unless business conditions specify further reductions in which event the carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effective."

The reference made to the period provided in Article 3 of the agreement of May 3, 1957 is an agreement between the Railroad Yardmasters of America and a number 436 of railroads. The period extended from May 3, 1957 to November 1, 1959.

(Counsel for plaintiff, on the basis of the witness' last

answer, moved that the last two exhibits offered in evidence by the defendants be stricken for the reason that the answer purely indicated that the rule which the defendants in the instant case were contending for, being for an eternal period of time, was entirely different from the agreement referred to in the two exhibits which 437 had a definite termination date. The Court denied the motion.)

438

Cross-Examination.

The termination date provided in the agreement of May 3, 1957 is November 1, 1959. That is the same date on which the November 1, 1956 moratorium agreement expires.

439 (It was stipulated by plaintiff that with respect to Defendants' Exhibit No. 18, the circular from the Association of Western Railroads; that the North Western had received a copy of that circular.)

441 (Plaintiff's Exhibit 11 for identification was received in evidence as PLAINTIFF'S EXHIBIT 11.)

442 THEODORE M. VAN PATTEN, called as a witness by the plaintiff, having been first duly sworn, testified in rebuttal as follows:

Direct Examination.

My name is Theodore M. Van Patten. I live at 404 East Washington Boulevard, Lombard, Illinois. I am Director of Personnel of the Chicago and North Western Railway. I was the Chicago and North Western Railway Company's representative in the National Mediation Board proceedings E-175 of last week. The mediator of those proceedings was Mr. Wallace Rupp. I met with Mr. Rupp once in Case E-175 shortly after 2:30 p. m., August

19, 1958, in my office. No one was present but Mr. Rupp and myself.

When we got around to talking about Case E-175 Mr. Rupp asked me if there was any field that I knew of which might form a basis for settlement of the dispute. I told him, yes, I thought there was. I said to Mr. Rupp that without prejudice to my position, regarding the bargainability, I thought there was a possibility of settling the entire question involving the proposed rule and the station agency question on the entire railroad by working out

an arrangement whereby the number of layoffs might 444 be slowed down by limiting the number of layoffs per year to an agreed upon percentage of the total number of jobs of the telegraphers over and above the reduction in the number of such employees by attrition.

Mr. Rupp thought for a minute and he said, "You have planted a seed"—as he put it—"and given me something to talk to the organization about."

I cautioned Mr. Rupp that I was not making a formal proposal, although I did give him every reason to believe that I was willing to undertake negotiations along that line.

Mr. Rupp said he understood it was not a formal proposal and stated that that was certainly not the time for formal proposals to be made by either party, but it gave him a thought and gave him something to talk to the organizations' O. R. T. representatives about, and he indicated to me that when he left my office, he was going over—I believe he said to the Congress Hotel—to talk to the O. R. T. committee, and if they were interested, he would call me the following morning.

I told Mr. Rupp I had a rather important meeting at 10 o'clock the following morning, and I would appreciate it if he did call me that he call me either before 10 445 o'clock or after lunch. Mr. Rupp did not call me.

BEN W. HEINEMAN, previously called as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination.

The custom and practice in the railroad industry concerning the duration of a bargaining agreement is that the agreements are perpetual and must change by 446 mutual consent. By "mutual consent", I mean it requires the consent of both parties. That is certainly the common practice. They have no expiration dates. They could have an expiration date only if both parties agreed to it. The basic agreements have no expiration dates and such dates may be inserted only by mutual agreement. They cannot be inserted unilaterally. In that regard they are different from the customary industrial agreements. The provisions remain frozen in the railroad agreements.

447 Both the Mediation Board and the Railroad Adjustment Board find their origin in the National Railway Labor Act. The Railway Adjustment Board procedure is that of final and compulsory arbitration. The decisions are binding on both parties, both the organization and the carrier, and are not appealable.

The Mediation Board procedure is that of mediation only as distinguished only from arbitration. It has no final effect so far as the parties are concerned, no binding effect upon them. It is intended as persuasion and 448 mediation, which is the best word. Of course, under mediation proceedings under the Act, arbitration may be in order and usually is in cases where the parties are unable to reach agreement. However, if arbitration is not accepted by the parties, the Mediation Board has no power to compel arbitration, so that the essential differ-

ence is that on the disputes which go to the Railway Adjustment Board, which are essentially disputes arising as to certain conditions in a grievance, that is a final compulsory arbitration, whereas mediation procedures, as I say, are those of mediation only, the best offices to persuade the parties and bring peace and agreement.

The class and craft of employees represented by the defendant organization come under the Railroad Unemployment Act. The railroad makes payments under the terms of that Act to provide for unemployment for that craft and class of employees. As to how much the North Western Railway pays, in 1957 our payroll taxes for unemployment compensation amounted to \$1,900,000.00.

456 If the proposed rule had been in effect on the North Western Railroad during the time that railroad was completely dieselized, as I have testified, the North Western would not have been able to dieselize the railroad. If the proposed rule had been in effect on the North Western Railroad, the North Western Railroad would not have been able to consolidate its fourteen points for heavy repair of cars into the one modern shop, about which I have testified, at Clinton, Iowa. The 458 North Western Railroad has pending plans for the installation of centralized traffic control. If the proposed rule were in effect on the railroad, the North Western would not be able to carry out those plans for centralized traffic control. That is assuming this rule was in effect according to its terms.

459 460 If the proposed rule were put in effect on the North Western, the North Western would not be able to carry out its plans for modernizing the Proviso Yard into a push button yard. The North Western has a program to improve the protection at grade highway crossings, which is about 75 per cent completed. As to that part of

the program which is completed, the North Western could not have carried it out if the proposed rule had been 461 in effect. The remaining part of that program yet to be done could not be carried out in the face of this rule.

If the rule had been in effect on the North Western, the North Western could not have carried out its mechanization of maintenance of way procedures.

As to the reason I have testified that the North Western could not have made certain modernization improvements in the past and could not make them in the future under 462 this proposed rule, these programs of modernizing transportation systems, including the North Western, require capital, and the capital can depreciate—the interest and cost of the money can only be obtained, earned, and the depreciation of the additional capital investment made to modernize can only be amortized through a company savings which one generates by the investment of the capital. This proposed rule, if enforced on the North Western Railroad, would preclude any such savings for all time.

In my opinion, the modernization programs, both those already accomplished, and those proposed, are necessary for the North Western Railroad, and, in my opinion, the railroad industry.

With respect to the matter of termination dates of railroad collective bargaining agreements, I am aware of the provisions in the Railway Labor Act by which either party can at any time serve a thirty-day notice pursuant to Section 6 for any proposal to revise, modify or terminate any portion of those agreements. As a matter of law, it is correct that after such notice has been progressed to the procedures provided in the Railway Labor Act, and

the terminal point has been reached, if the carrier has made the proposal and the time limitation periods have expired, that the carrier can put that change into effect unilaterally, and the only recourse the employees have
464 is to strike. Depending upon what the issue is, as a practical matter, that has occurred many times on railroads in this country. The railroads, by that process, on a number of occasions, have changed agreements and terminated provisions of agreements.

As to whether the railroads always comply with the final and binding awards of the National Railroad
465 Adjustment Board, they have so far as I know. I don't

know what the Fourth Division Award 1158 is. I am familiar with the provisions of the Railway Labor Act that authorize a suit in the Federal District Court to enforce awards if they are not complied with. It has on a number of occasions been necessary for such proceedings to be brought and in general there have also been instances of strike, but not against the North Western Railroad. I don't know of any instances where there have been strikes and threatened strikes over failure of the railroads to put into effect awards of the National Railroad Adjustment Board.

466 When I said "final and binding", I was saying "legally binding or legally final and binding"; as a matter of law, they were obligated to carry it out. It
467 might be in the hands of a receiver and he is not able to carry it out.

468 As to the distinction between classes of disputes that go to the National Railroad Adjustment Board and those to the National Mediation Board, my understanding is that first of all, cases go to the National Railway Adjustment Board arising under the interpretation of agreements dealing with rates of pay, rules and working conditions. In addition, my understanding is that

although Section 5(2), I believe, of the National Railway Labor Act provides that the Mediation Board should interpret mediation agreements, but nevertheless the Mediation Board has consistently, from the time of its establishment, taken the position that it will only interpret executory mediation agreements, and that executed mediation agreements are for the Railway Labor Adjustment Board.

I might add, since you asked me, it is for that reason that in our opinion and in the opinion of many fine lawyers around, the question of Section VI of the mediation agreement, which is the November 1, 1956 agreement, is submitted to the Railway Adjustment Board.

My information that the National Mediation Board has consistently confined its interpretation of mediation agreements to an executory agreement is from the report prepared by the National Mediation Board covering its duty, its functions from 1935 to 1957, which is a green-back report published by the United States Government and readily available.

470 At the conclusion of my direct examination, I answered a series of questions from counsel as to things which the North Western Railroad could not have done or could not do in the future if this proposed rule had been or would be in effect. I am familiar with the provision in the proposed rule which says, "except by agreement between the carrier and the organization".

As to whether my answers to those questions were predicated upon the assumption that the organization would, under no circumstances or at any time, agree to the discontinuance of a job, my answer was predicated upon the experience that the organizations would not agree to the abolition of jobs except upon their own terms. In short, that they would have a veto power.

472 We have not had any experience with such a rule as this, but we have had considerable experience with

the telegraphers in connection with the modernization of our stations. That is not under any such rule, but under much more favorable rules to the railroad than this. There may have been an isolated case where The Order of Railroad Telegraphers has agreed to a dualization of agencies, I just don't really know.

Colloquy.

(*Portion of the Closing Argument of Counsel for Defendants, Mr. Elson.*)

593 "The Act gives the labor organizations, as a matter of fact in the case of individual employees, individual employees, the right to file grievances and go through the Adjustment Board, or an organization can do what this organization has done, which is to attempt not to have to process a lot of grievances. It would take years to process them, but to make a proposal, a specific proposal changing the agreement which would permit—which would eliminate the need for grievances. I don't know whether your Honor is familiar with the conditions involving the Third Division Board, and I hope none of the members of the Board will take offense at what I have to say, but the report of the National Adjustment Board for June 30th of 1957—and I am referring to Page 52—shows that as of July 1, 1956, there were 1,455 cases on hand. During the year they decided 599 cases, and on June 30th they had on hand 1,744 cases, or approximately a back load of three years' work.

"Now, if an organization chooses not to go through the grievance procedure and process individual grievances and wait three years for a decision, but instead to handle the matter by changing the agreement, I say to your Honor that is clearly contemplated by the Act as a right which the organization has, and a right which

cannot be denied to it. As a matter of fact, as far as the Act itself is concerned, if all the Telegraphers did was to confine that Section 6 notice simply to station agents, that would not change the situation, assuming it had been done, assuming that was a Section 6 notice that as to station agents there should not be any change. Under the Act it is perfectly permissible for a labor organization to frame the change it wants in the contract to meet the particular situation it has in mind, if that was the situation. That wasn't the way the issue was framed; it was framed, as your Honor well knows, to cover all positions, not just the station agents alone.

"All I am saying, your Honor, is that there is nothing in the Act, contrary to what counsel says, which would preclude that kind of a Section 6 notice, instead of going through the laborious process of filing grievances, and going through the Adjustment Board."

* * * * *

596 "Now the second episode which was referred to was the testimony of Mr. Van Patten. I have no question, your Honor, that both Mr. Van Patten and Mr. Leighty told the truth when they were on the stand. Mr. Van Patten said he had indicated that there might be a counter-proposal available to the organization. Mr. Leighty testified that no proposal was made, and on this record is very clear."

Opinion of the Court.

The Court: Gentlemen:

This has been and is an extremely important case, of course; nobody denies that. I think it is also highly technical. But I have spent a lot of time on the matter. I listened to the evidence carefully, much of which, in the strictest sense, probably was not entirely relevant. I rec-

ognize the problem; I recognize that as a society grows the railroad industry develops; that naturally practices change, and there is no question but what the North Western, as many other railroads, has had a number of positions that have been developed, as times have changed, and has been what in railroad and union terms are sometimes referred to as "feather-bedding".

I recognize that has developed there. I heard the testimony concerning the changes that have taken place. It wasn't completely in full. I heard the number of positions that have been changed there. I believe Mr. Heineman testified that it was 26,000, or approximately, and then they were reduced in the two-year period to 18,000. I heard the testimony concerning a lot of other useless expenses, and of course naturally when you curtail activities, some of the income is reduced, but I assume from what the testimony that was presented here, a lot of that income that was reduced was not paying its way, and that it was economically necessary, I believe, as Mr. Heineman said, to quote, "Perform surgery" and apparently that has been done.

We didn't have any evidence introduced here specifically as to how the railroad had been affected. There was no statements of the earnings during that period, no statements of the present financial condition, but I assume from the testimony there that it must be in better financial circumstances considerably. I couldn't tell whether all of these improvements have been made because of the waste that has been eliminated, or whether there was some borrowing and the company had gotten into a stronger position. I didn't get all of those details, but I was interested in them.

The real question, I see it is Number 1, Is this a bargainable proposed rule? That is the heart of it; Number 2, the next thing is, Does this court have jurisdiction to act?

I have followed this evidence through here and I am not going to review it. It is not necessary to review it, because nobody disputes but what the regular proceedings were followed through, that the Telegraphers, through their union representatives, have followed the correct procedure and did serve their strike notices and did perform all of the acts that were required.

I notice here that the National Mediation Board withdrew from further mediations. Then again on August 14, Mr. Thompson of the Board offered the Board's emergency services further, and asked each side to defer its actions. Then after that both sides accepted, and the Mediation Board resumed mediation.

No success was attained, and then on August 20th the Mediation Board withdrew and closed its file. Now meanwhile the strike notices had gone out.

I have here cited this Toledo case. I have read it, and I have just read it again at recess. In that case there was a very similar situation. When the Mediation Board resumed because of the Pearl Harbor Emergency or National catastrophe. They resumed and re-entered the case. However, searching both the lower court record and the higher court record, nowhere do I find that either side accepted. I don't believe that case is controlling. I believe that, from the record here, both sides accepted, and I believe there was renewal, and I believe the thirty-day period starts running here on August 20th and expires on September 19th at midnight, to the best of my record here.

I believe that this court has jurisdiction to restrain the strike during that period of time. I believe this is a bargainable matter. I don't think there is any question about it, in my viewpoint. There is a provision that either of the parties could ask the Mediation Board to make this determination, and that has not been requested by either side, and of course I can't pass on something that is not

presented to me. There is a provision for that, and then the Mediation Board could make a determination. However, I presume that the Mediation Board would not act upon the matter if it didn't consider it within its jurisdiction, and the fact that it has heretofore found that the Section 6 notice was properly processed or "progressed" as it is called here, would indicate to me that they have made some decision on that point, but there is nothing specific.

I don't know what their decision would be. They have not been flatly asked to do it. Technically it may be that they only ruled that the procedure was correct, and they may not have interpreted it. I think they have an obligation to interpret whether or not it is for the Mediation Board.

If they did determine that it was a matter for the Mediation Board, certainly the strike could proceed after the time has expired. On the other hand, if they decided that it was a matter for the Adjustment Board, well I don't know what the situation would be there, but it would present another set of facts. In my judgment there is a bargainable issue here because, in making our financial adjustments, we must take into consideration the rights of the individuals, as well as the rights of the stockholders, and I have considered that. That is a big factor in stabilization of employment, and that is one of the questions that is bargainable.

Now that is my opinion, and I will enter a decree in this matter restraining a strike in this matter until September 19th at midnight at which time I believe my jurisdiction will expire.

I believe I have jurisdiction under the River Road case there, because in my judgment we are still within the thirty-day period. I am finding, as a matter of fact, that there was a resumption of negotiations. I trust, of course,

by that time if no progress has been made, that the Mediation Board will see fit to inform the President, and then, of course, he has the power or the right, if he believes it should be done, to appoint a fact-finding committee.

This is a serious matter, and I must stay within my jurisdiction and my jurisdiction will not extend to granting a permanent injunction on the record here. The findings of fact and conclusions of law, which I direct to be prepared here and presented or proposed, shall also include a finding that this is a major dispute, and not a minor dispute, and that it properly should be submitted to the Mediation Board for further mediation if at all possible, and that it is not a matter to be submitted to the Adjustment Board, because any matter that is submitted there ultimately results in arbitration, and I don't believe that we have reached the state yet, certainly under our statutes, that labor agreements will be settled by arbitration. That is the general outline of my decision in this matter, gentlemen.

Now, I will come to the practical problem. We will need a formal decree, and we will need findings of fact and conclusions of law. If you gentlemen representing the railroad can assure me that the matters will remain in status quo until Monday at 2:00 o'clock, we can have proper decrees entered at that time, and findings of fact in line with what I have suggested. I don't know what your ability is with respect to that. I recognize your position that I am without jurisdiction. However, I revert to Rule 62-C that would give me the right to continue the present restraining order in full force and effect until such time as I could do it.

Now what is your position on that? Otherwise I will just stay right here and we will sit down and draw a decree and findings of fact. It doesn't make a bit of differ-

ence to me. I would just as soon go home, and I guess you folks would, and take it easy, because I find that haste makes waste, and I would rather work it out in sensible time, and let it come ahead say, Monday at two o'clock and give you time to get to your offices and work on it Monday morning, and over the week-end.

Now that is what I would prefer to do, but I am not going to be arbitrary about it.

The Court: I think as far as I am concerned I want a final order and a final decree, and I want the final order to be that that is the limit of my jurisdiction, that I have no jurisdiction to enter a permanent injunction; I have only jurisdiction to limit it to the 19th of September at 12 P. M., after the 30 days of cooling period has expired, the 30 days which I now find began after the resumption of the mediation, because I am finding—and I know both of you will agree with me, both sides, that the evidence is clear that both sides accept mediation again, and since both sides accepted it, I am ruling—I am going to make a finding of fact that that started a new 30-day period. I would say that neither one of you could compel the other to do it; neither could the Board impose a cancellation of your 30-day period on you, but I firmly believe that were you each one resumed mediation with the agreement with the Board, which re-enters the case, I believe that that starts it over, and I believe that I have jurisdiction to do it, and that is going to be my finding of fact. But I want a final decree, and I want one that is appealable. I want a finding of fact that this is bargainable, and I want a finding of fact that it should not go to the Adjustment Board. I believe that that is the proper thing to do, and I want a decree that will be in shape to be presented to the Court of Appeals.

I know I am just a stepping stone, and it is the court really of last resort, unless there is a constitutional question involved.

OFFICE OF THE SECRETARY

Public Utilities Commission,
State of South Dakota.

This Certifies, That I have on this 22nd day of August, 1958, compared the hereto attached copy of instrument known as Report and Order in the matter of Rearranging and revising station agency service in South Dakota, by the Chicago and North Western Railway Company, in Public Utilities Commission Docket No. F-2499 with the original now on file with me, as Secretary, and the same is a full, true, correct and identical copy of said original and of every part thereof.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the Public Utilities Commission of the State of South Dakota, at Pierre, the Capital, on this 22nd day of August, 1958.

E. F. Norman,

(Official Seal) *Secretary, Public Utilities Commission,
State of South Dakota.*

PLAINTIFF'S EXHIBIT NO. 2.**BEFORE THE PUBLIC UTILITIES COMMISSION
of the State of South Dakota.**

In the Matter of the Application of
The Chicago and North Western
Railway Company for Authority
to Revise, Adjust and Rearrange
Its Agency Service in South
Dakota.

REPORT.

(F-2499)

Appearances:**On Behalf of Petitioner:**

Warren Newcome, Attorney, 644 Minnesota Building, St. Paul, Minnesota.

F. O. Steadry, Attorney, 400 West Madison Street, Chicago, Illinois.

William S. Churchill, Attorney, N. W. Security National Bank Building, Huron, S. Dak.

For The Order of Railroad Telegraphers, Protestants:

Lester P. Schoene, General Counsel, 1625 K Street, N. W., Washington, D. C.

C. O. Griffith, Attorney, 3860 Lindell Blvd., St. Louis, Mo.

R. C. Williamson, 835 Third Avenue, S. E., Cedar Rapids, Iowa.

G. E. Leighty, 3860 Lindell Blvd., St. Louis, Mo.

Other Appearances in Protest:

Paul F. Burke, Attorney, Miller, S. Dak., appearing for towns of Hitchcock, Wessington, Bone-steel, Mansfield, Northville and Athol.

Raymond E. Dana, Attorney, 812 National Bank of South Dakota, Sioux Falls, S. Dak., appearing for towns of Hartford, Humboldt and Montrose.

Lester H. Herbrandson, Attorney, Volga, S. Dak., appearing for towns of Volga and Iroquois.

Boyd Nelson, Manager, West South Dakota Traffic Bureau, Rapid City, S. Dak., appearing for the West South Dakota Traffic Bureau.

Vincent J. Protsch, Attorney, Howard, S. Dak., appearing for towns of Carthage and Canova.

Ramon A. Roubideaux, Attorney, Fort Pierre, S. Dak., appearing for town of Fort Pierre.

Harvey A. Gunderson, Attorney, Clear Lake, S. Dak., appearing for towns of Castlewood, Gary and Henry.

Roger C. Lohman, Attorney, Parker, S. Dak., appearing for towns of Parker and Canistota.

Gordon Mydland, Attorney, Brookings, S. Dak., appearing for towns of Turton and Lake Preston.

Herbert A. Heidepriem, Attorney, Miller, S. Dak., appearing for towns of Harrold, Miranda, St. Lawrence, Seneca, Ree Heights, Rockham and Zell.

Irving A. Hinderaker, Attorney, Way-Penney Building, Watertown, S. Dak., appearing for towns of Astoria and Estelline.

H. O. Lund, Attorney, Brookings, S. Dak., appearing for town of Elkton.

G. H. Johnson, Attorney, Gregory, S. Dak., appearing for towns of Dallas and Wood.

James Brennan, Attorney, Rapid City, S. Dak., appearing for towns of Hermosa, Quinn, Oral, Sturgis, Buffalo Gap, Oelrichs, Underwood, Whitewood, Nisland,

Plaintiff's Exhibit No. 2.

Weldmar Weverstead and Donald McMurchie,
Centerville, S. Dak.

Alvin H. Schulz, Attorney, Brookings, S. Dak.,
appearing for town of Bruce.

C. M. Baldridge, Chairman, Town Board of North-
ville, S. Dak.

Earl Bexter, Qnida, S. Dak.

Robert Chambèrlain, Hecla, S. Dak.

Lloyd Kegler, Athol, S. Dak.

R. C. Stenson, Colome, S. Dak.

Clem Russell, Oral, S. Dak., appearing for Angos-
tura Irrigation Project.

Ralph Herseth, Houghton, S. Dak.

Fred Hanson, Alcester, S. Dak.

W. H. Preston, Salem, S. Dak.

A. E. Crooks, Frankfort, S. Dak.

John Stahl, Doland, S. Dak.

Melvin Hoppe and Al Keonig, Fairfax, S. Dak.

H. W. Tiahrt, Claude Sherard and Floyd Fleygar,
Hurley, S. Dak.

Frank Bell, Ferney, S. Dak.

As Employees of the Public Utilities Commission:

Herman L. Bode, Attorney, Pierre, S. Dak.

Elwin Quinney, Engineer, Pierre, S. Dak.

By application filed on the 5th day of November, 1957,
the Chicago and North Western Railway Company (hereinafter called Petitioner) seeks authority to close sixty-nine (69) one-man railroad agency stations on its lines
in South Dakota, to withdraw the agent thereat and to remove the depot therefrom. As an alternative to such authorization by this Commission, the Petitioner offers and proposes to inaugurate a central agency service by which one station agent, from a central point, would be required

to render agency service at one or more adjacent stations, by traveling by automobile from the central station to the adjacent town or towns, and thus continuing agency service at sixty-eight (68) of the points, from which secession of service is proposed. The stations involved are as follows:

Agar	Farmer	Montrose
Alcester	Ferney	Nisland
Athol	Fort Pierre	Northville
Astoria	Frankfort	Oelrichs
Blunt	Fulton	Onida
Bonesteel	Gary	Oral
Bruce	Groton	Parker
Buffalo Gap	Harrold	Quinn
Burke	Hartford	Raymond
Canistota	Hecla	Ree Heights
Canova	Henry	Rockham
Carthage	Hermosa	St. Lawrence
Castlewood	Herrick	Seneca
Centerville	Hitchcock	Turton
Colome	Houghton	Underwood
Columbia	Humboldt	Valley Springs
Conde	Hurley	Volga
Cottonwood	Iroquois	Wakonda
Dallas	Lake Preston	Wessington
Doland	Lebanon	Whitewood
Elkton	Mansfield	Wolsey
Estelline	Miranda	Wood
Fairfax	Monroe	Zell

The towns at which central agency service is proposed to be established as an alternative to closing are as follows:

Bonesteel	Estelline	Iroquois
Blunt	Groton	Northville
Burke	Hecla	Onida
Centerville	Hermosa	Oral
Doland	Humboldt	Parker
		Wolsey

The proposed central agency plan will result in the following line-up of station agency service:

Stations in Each Area Involved in the Central Agency Program and the Area Agency Headquarters.

Athol; Northville; Mansfield—Northville
Columbia; Houghton; Hecla—Hecla
Astoria; Ivanhoe, Minn.; Arco, Minn.; Hendricks,
Minn.—Hendricks, Minn.
Gary; Burr, Minn.; Canby, Minn.—Canby, Minn.
Lake Benton; Elkton—Lake Benton, Minn.
Castlewood; Estelline; Bruce—Estelline
Arlington; Volga—Arlington
Turton; Conde; Ferney; Groton—Groton
Agar; Onida—Onida
Seneca; Lebanon; Gettysburg—Gettysburg
Miranda; Rockham; Faulkton—Faulkton
Zell; Redfield—Redfield
Frankfort; Raymond; Doland—Doland
Henry; Clark—Clark
Hitchcock; Wessington; Wolsey—Wolsey
St. Lawrence; Miller—Miller
Ree Heights; Highmore—Highmore
Harrold; Blunt—Blunt
Carthage; Iroquois—Iroquois
Lake Preston; De Smet—De Smet
Canistota; Canova; Salem—Salem
Monroe; Hurley; Parker—Parker
Alcester; Beresford—Beresford
Wakonda; Centerville—Centerville
Montrose; Hartford; Humboldt—Humboldt
Valley Springs; Sioux Falls—Sioux Falls
Farmer; Spencer—Spencer
Fulton; Mitchell—Mitchell
Oelrichs; Oral—Oral
Buffalo Gap; Hermosa—Hermosa
Whitewood; Sturgis—Sturgis
Nisland; Newell—Newell
Underwood; Wasta—Wasta
Quinn; Wall—Wall

Cottonwood—(Station to be closed and unassigned)
Fort Pierre; Pierre—Pierre
Fairfax; Bonesteel—Bonesteel
Herrick; Burke—Burke
Dallas; Gregory—Gregory
Colome; Wood; Winner—Winner

The petition in this case invokes the authority and duties of this Commission as set out in the following Sections of the South Dakota Statutes:

Section 52.0932:

"It shall be unlawful for any railroad company owning or operating, or which may hereafter own or operate, any railroad, in whole or in part, in this state, to abandon any station on its line of railroad when once established, to remove the depot therefrom, or withdraw any agent therefrom without the written consent of the Public Utilities Commission after notice and public hearing and due consideration of all circumstances including the revenue derived by such railroad from the incoming and outgoing business at such station, its expense of maintaining an agent thereat and public convenience and necessity involved."

Section 52.0202 (Skeletonized):

"Whenever in the judgment of such Commission it shall appear that * * * any change of its stations * * * or any change in the mode of operating its line, or lines, or conducting its business is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the Commission shall inform such common carrier of the improvement or changes which it adjudges to be proper, by notice thereof in writing by leaving or mailing by registered mail a copy thereof, certified by its secretary, to or with any station agent, clerk, treasurer, or any director of such common carrier."

Section 52.0310:

"In any action or proceeding wherein any order of the Public Utilities Commission shall in anywise come

in question, the validity of such order shall be presumed, and it shall not be necessary to allege or prove any fact on which the validity of such order depends, but the burden shall be upon the party claiming such order to be invalid to plead and prove the facts establishing such invalidity."

The broad gauge state-wide scope of this petition directs our attention to, not only the convenience and necessity of the individuals directly concerned at each of the communities involved herein, but also brings into focus the public welfare of a very large segment of the people of South Dakota. It was deemed expedient therefore that the matter be set down for public hearing at Pierre, the Capital, at which time the Petitioner could present its case and the hearing be then adjourned to a later date at which time the transcript of the first hearing could be available to protestants for their use in cross-examination and the presentation of further testimony.

Therefore, on November 5, 1957, the matter was first assigned for hearing to be held at the State House in Pierre, the Capital, on November 25, 1957, at the hour of 9:30 o'clock of the forenoon, at which time and place Petitioner presented its case in principal. On November 26, 1957, the hearing was adjourned to reconvene on December 18, 1957, at which time three days were consumed in the cross-examination of Petitioner's witnesses and the presentation of some protestant testimony. On December 20, 1957, the hearing was adjourned to reconvene for the convenience of protestants at Huron, South Dakota, on January 13, 1958, and at Rapid City, South Dakota, on January 16, 1958, and hearings were finally concluded at Rapid City on January 17, 1958.

The Chicago and North Western Railway Company (including the Chicago, St. Paul, Minneapolis & Omaha Railway Company now under lease) operates, system-wide, a total of 9403 miles of road (single track), of which 1311

miles or 14% is within South Dakota. This 1311 miles of road is 33% of the total mileage of road operated by the nine railroads now operating in South Dakota. It is exceeded only by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company which operates 44% of the total. In 1956 the Chicago and North Western and Omaha moved 421,266,000 ton miles of revenue freight in South Dakota, which was about 21% of the total South Dakota railroad revenue freight, but its operating ratio (operating expenses in percent of operating revenues) was 118% as compared to 93% for all railroad operations in South Dakota.

The evidence shows that Petitioner controls an important segment of our transportation system in South Dakota and that it must improve its operating ratio considerably if such vital segment is to survive.

As of December 31, 1956, the C. & N. W. Railway Company had a capital structure as follows:

Common Stock Outstanding (\$100

stated value)	\$ 81,225,400	17.00%
Surplus	89,662,908	18.76%

Total Common Equity Capital	\$170,888,308	35.76%
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5% Preferred Stock (\$100 Par) ..	91,390,300	19.12%
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3% Mortgage Bonds, unmatured ..	50,592,000	10.59%
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4½% Mortgage Bonds, unmatured ..	67,525,272	14.13%
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Equipment Trust Certificates (3.294% Composite)	97,506,221	20.40%
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Total Long-Term Debt.....	\$215,623,493	45.12%
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Total Capital	\$477,902,101	100.00%
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The C. & N. W. Railway Company has not paid a dividend on common stock since 1950; it has paid no dividend on preferred stock since 1954; and in 1956 its net income was insufficient to pay all of its fixed charges. On January 17, 1958 (at conclusion of hearings), C. & N. W. Railway Company common stock sold on the New York Stock

Exchange at \$14 per share; its preferred stock sold for \$20; and its 4½% Mortgage Bonds had a market value of about \$45. Obviously, Petitioner must improve its earnings position by operating economies before it can hope to raise any further capital through sale of its securities to the public.

Petitioner's affirmative case is largely devoted to proving the lack of public convenience and necessity. This factor is established by the small amount of time involved in the work of the agent at each of the sixty-nine (69) stations, in which it appears that the workload varies from a minimum of 12 minutes per average working day at Ferney, to a maximum of 2 hours at Onida (Exhibit 5). For the 69 stations this works out to an average workload of 50 minutes for an average working day, per station.

The information on which this, so-called workload, is based was obtained from a survey of the various station activities conducted during the summer of 1957. The survey was made by teams of traveling auditors who went to each station to check the number of units of work and other station activities relating thereto. In this survey a unit of work represents the handling of one shipment, either carload or less than carload, either incoming or outgoing; the handling of one reconsigning order; the preparation of a demurrage bill; the payment or collection of each C.O.D. charge; one interchange report; the sale of one ticket; the handling of one milk or cream can; the handling of one express shipment; the handling of one telegram; the making of one report, and such other things that are done at a railroad station. The total of these work units for each station for the years 1956 and 1951 were then compiled in the general accounting office and the average number of work units per working day was computed for each station involved. Then these traveling auditors, and other experienced employees in the accounting office, unanimously

agreed that fifteen (15) minutes was sufficient (or more than sufficient) time for an agent to perform or handle each of these units on an average, and this assumption was concurred in by the executive department. The workload for each station was then determined by multiplying the average number of work units per working day for each station by 15 minutes and thus finding the average station workload per working day in hours and minutes (Exhibit 11). The men that made this survey, and estimated the time consumed, are long-time employees of the company, all of which had had previous station agent experience, and we believe the method herein devised gives a fair picture of the relative amount of work actually required of an agent at each of the 69 stations involved. The time required by an agent at a station to perform the agency service necessary thereat is an important and relevant factor in determining and measuring the public convenience and necessity for the service and will be given due consideration in our deliberations in this case.

The rendition of agency service in connection with the transportation of passengers and property by a railroad is, where needed necessary to constitute adequate service for the accommodation and convenience of the public, hence we are confronted in this case with rendering a decision on the following basic issues:

1. Does the record require the closing, the withdrawal of agency service, and the removal of the station buildings at the 69 stations involved in this proceeding?
2. Does the central agency service proposed in Petitioner's agency plan under which agency service will be continued at each of sixty-eight (68) stations constitute an abandonment of the station, or withdrawal of an agent as contemplated by Section 52.0932 of the South Dakota Code?

3. Does the failure of the Petitioner to assign the small amount of work at two or more stations to one central agent constitute inefficient and uneconomical management of its transportation operations, and is it the duty of this Commission to issue a service order requiring Petitioner so to do, thus avoiding at many of the stations the abandonment thereof?

1. Complete Abandonment of Agency Stations.

Section 52,0932 of the South Dakota Code directs this Commission to consider, in a station closing case, the following relevant factors:

The revenue derived by the railroad from incoming and outgoing business at each station.

The expense of maintaining an agent thereat.

Public Convenience and Necessity.

The total estimated revenues derived by Petitioner from all incoming and outgoing business, assignable to the 69 stations involved in this case, is shown (Exhibit 66) to be \$1,854,420 for the year 1956. Ninety-two percent of this amount (or \$1,706,066) was consumed in paying operating expenses other than station expense, leaving a balance of \$148,354 for direct station expense. The total station expense of operating these 69 stations, including agent's wages, depot maintenance, heat, light, telephone, ect., was \$318,723, or \$170,369 deficit. Had the proposed central agency plan been in effect for 1956, with agents at only 16 of the 69 stations, thus eliminating the station expense at 53 stations, this station expense would have been reduced by \$229,253, or to a total of \$89,470, leaving a balance of \$58,884 for surplus.

All of the 69 stations, with the exception of Dallas, Fort Pierre, Frankfort and Onida, show a corresponding deficit as set out below:

	Total Revenues Derived	Expense Other Than Station Expense	Balance Remaining	Station Expense	Deficit or Surplus
Agar	\$ 46,455	\$ 42,739	\$ 3,716	\$ 4,483	(\$ 767)
Alcester	14,838	13,651	1,187	4,833	(3,646)
Athol	20,114	18,505	1,609	4,322	(2,713)
Astoria	12,246	11,265	980	4,460	(3,480)
Blunt*	38,078	35,032	3,046	5,702	(2,600)
Bonesteel*	4,401	4,049	352	5,448	(5,096)
Bruce	25,984	23,629	2,055	4,858	(2,803)
Buffalo Gap	13,626	12,536	1,090	4,821	(3,731)
Burke*	18,437	16,962	1,475	4,894	(3,419)
Canistota	13,066	12,021	1,045	4,708	(3,663)
Canova	12,721	11,703	1,018	4,876	(3,858)
Carthage	23,511	21,630	1,881	4,806	(2,925)
Castlewood	30,750	28,290	2,460	4,666	(2,206)
Centerville*	42,007	38,646	3,361	5,251	(1,890)
Colo. ne	17,778	16,356	1,422	4,614	(3,192)
Columbia	48,488	44,809	3,879	4,602	(723)
Conde	4,036	3,713	323	4,352	(4,029)
Cottonwood	5,166	4,753	413	1,800	(1,387)
Dallas	114,490	105,330	9,159	4,631	4,520
Doland*	46,690	42,955	3,735	4,507	(772)
Elkton	8,904	8,192	712	4,773	(4,061)
Estelline*	46,897	42,961	3,736	4,628	(892)
Fairfax	3,459	3,182	277	4,504	(4,227)
Farmer	12,455	5,541	996	4,190	(3,194)
Ferney	30,208	27,791	2,417	4,317	(1,900)
Fort Pierre	87,119	80,149	6,970	4,859	2,111
Frankfort	64,272	59,130	5,142	4,569	573
Fulton	23,554	21,670	1,884	4,403	(2,519)
Gary	14,087	12,962	1,127	4,560	(3,438)
Groton	34,471	31,713	2,758	4,689	(1,931)
Harrold	17,708	16,291	1,417	5,422	(4,005)
Hartford	30,884	28,413	2,471	4,646	(2,175)
Hecla*	51,875	47,725	4,150	4,615	(465)
Henry	24,511	22,550	1,901	4,502	(2,541)
Hermosa*	11,838	10,891	947	4,466	(3,519)
Herrick	8,192	7,537	655	4,647	(3,992)
Hitchcock	53,104	48,856	4,248	4,608	(360)
Houghton	43,190	39,743	3,456	4,564	(1,108)
Humboldt*	12,712	11,695	1,017	4,553	(3,536)
Hurley	14,024	12,902	1,122	4,827	(3,705)
Iroquois	36,421	33,511	2,914	5,270	(2,356)
Lake Preston	15,687	14,432	1,255	4,828	(3,573)
Lebanon	10,983	10,104	879	4,589	(3,710)
Mansfield	19,335	17,788	1,597	4,423	(2,876)
Miranda	23,599	21,674	1,885	4,303	(2,418)
Monroe	7,762	7,141	621	4,639	(4,018)
Montrose	23,357	21,488	1,860	4,455	(2,586)
Nisland	30,442	28,007	2,435	4,816	(2,388)
Northville*	38,302	35,238	3,064	4,598	(1,534)
Oelrichs	23,050	21,206	1,844	4,775	(2,931)
Onida*	123,381	113,511	9,870	4,648	5,222

* Indicates proposed Central Agency. () Indicates Deficit.

	Total Revenues Derived	Expense Other Than Station Expense	Balance Remaining	Station Expense	Deficit or Surplus
Oral*	23,933	22,018	1,915	4,459	(2,544)
Parker*	10,895	10,028	872	4,774	(3,902)
Quinn	9,800	9,016	784	4,084	(3,300)
Raymond	51,020	46,938	4,082	4,469	(387)
Ree Heights	11,523	10,601	922	4,608	(3,686)
Rockham	17,147	15,775	1,372	4,493	(3,121)
St. Lawrence	14,193	13,059	1,136	4,350	(3,214)
Seneca	25,659	23,806	2,053	4,622	(2,569)
Turton	30,026	27,624	2,402	4,363	(1,961)
Underwood	20,924	19,250	1,674	4,356	(2,682)
Valley Springs	8,193	5,698	495	4,417	(3,922)
Volga	31,343	28,836	2,507	4,965	(2,458)
Wakonda	8,542	7,859	683	4,473	(3,790)
Wessington	25,596	23,548	2,048	4,729	(2,681)
Whitewood	6,106	5,818	488	5,700	(5,302)
Wolsey*	7,665	7,052	613	4,971	(4,358)
Wood	23,685	21,790	1,895	4,313	(2,418)
Zell	32,029	29,467	2,562	4,163	(1,601)
Totals	\$1,854,420	\$1,706,086	\$148,354	\$318,723	(\$170,369)

In determining the need of agency service, the amount of revenue derived from carload freight is not a controlling factor, since it is now generally recognized that carload shipments may be handled without a full-time or resident agent at each station, with very little inconvenience to the individual shipper, and no loss to the general public. At a closed station the same trains continue to run. Passengers (if any) can board the trains. Cars for outgoing shipments can be ordered by telephone at no expense to the shipper. Cars can be loaded and the bill left at a prearranged place for the conductor to pick up. The consignee will be notified of incoming shipments, but such shipments will have to be prepaid unless the customer can make satisfactory credit arrangements with the railroad company, which can be done in the case of most all carload shippers in this area. We are sustained in this view by numerous rulings from other state jurisdictions:

"It appears from all of the testimony taken before the State Corporation Commission (New Mexico)

that all carload business can, without inconvenience of any considerable amount, be handled without a station agent. It is only the less than carload business that requires a station agent so that shipments of goods can be made to or from the station without prepaying the freight." (New Mexico Supreme Court in *Re Denver & Rio Grande R. R. C.*—9 P. 2d, (140).)

"* * * that for the purpose of this discussion, the revenues from carload freight is not to be considered, because an agent is not needed for carload freight, and \$1900.07 of said \$2800.47 was from carload freight, and only \$95.52 from less than carload shipments, and \$891.40 from passengers; * * * The financial showing made by the company appeals strongly to the judicial mind. Railroads have to operate as economically as possible in times like these, and not increase expenses by extending facilities which heretofore have not been found indispensable." (Supreme Court of Louisiana in *Louisiana Railway & Navigation Company v. Railroad Commission of Louisiana*, 0 83 So., 849.)

"It will be borne in mind that the discontinuance of an agency does not discontinue the service of the railroad company at that point. The same trains continue to run and both freight and passengers may be transported to and from the station in question, * * * but it appears to be recognized that carload shipments may be handled without an agent with much less inconvenience than smaller shipments, although affording much greater freight revenue." (Supreme Court of South Carolina in *Southern Railway Company v. Public Service Commission*—10 SE 2d, 776.)

"So far as we know this is the first time this court has been called upon to decide the question of the removal of a station agent not in connection with the closing of the station or the reduction of train service * * *. There is no necessity for an agent to handle this (carload) business * * *. The convenience here is to individuals and not to the public. The convenience and necessity required are those of the public and not of an individual or individuals." (Alabama Supreme Court in *Alabama Public Service Commission v. Western Railway of Alabama*—15 PUR 3d, 524.)

The total gross tariff charges, other than that derived from carload business, from these 69 stations amounted to \$71,738 for the year 1956 (Exhibit 60). This represents gross charges before interline settlements with other railroads. The maximum for any one station was \$3,047, at Burke, where the agent's wages were \$4,526, and the minimum was at Cottonwood, in the amount of \$77, where the agent's wages were \$1,774. At none of these 69 stations did the revenue (other than carload freight) equal the agent's wages. The agent's wages exceeded such revenue by about 25 times at Ferney as a maximum, to 1½ times at Burke as a minimum.

Relatively few people have occasion to personally contact the agent at these 69 stations involved herein. Usually there are only one or two principal shippers at each station. There is a noticeable trend in the opposition testimony in this case to indicate that a personal, or community pride is at stake rather than a strict consideration of public convenience and necessity. A sample of this is the following excerpts from the transcript:

Q. And your interest in having an agent is to be able to order cars through him and have him sign your bills of lading?

A. Yes sir—and to keep our town alive. (Tr. 504.)

Q. Tell us something about your agent, and all that you know.

A. Oh—Our agent there, he's a swell guy; everybody likes him; and he's on the job. I know we would sure hate to lose him. (Tr. 465.)

Not all of the testimony was to this end. Many witnesses really believed that they would be inconvenienced by the withdrawal of a full-time agent. But here again most of such testimony was concerned with individual inconvenience more than actual public convenience and necessity.

The New Mexico Supreme Court in *Denton Bros. v.*

A. T. & S. F. Ry. Co. (277 P. 36) had this to say in regard to a similar situation:

"It is perfectly natural that every community should aspire to the best railroad service to be had. We have full sympathy with such aspirations. Yet it is to be remembered that, under our system of public control of rates and services, the general public, speaking broadly, loses in cost what it gains in service. So the railroad in resisting demands for uneconomical service, really represents the true interest of the general public."

Another type of testimony which is conspicuous by its absence in this case is that of the large grain companies operating in the state. The Peavey Elevators, operating 49 elevators in South Dakota, have 19 of them located at 14 of the stations involved herein. The Sexauer Company, operating 26 elevators in the state, have 11 of them in 8 of these towns. The Tri-State Milling Company have 7 elevators in 6 of these towns. No one representing any of these important shippers appeared or offered any opposition to the application.

The record discloses (Page 188 Tr.) due to the period of on-duty time (union rules) fixed for an agent at one-man stations, being from 8:30 a. m. with eight hours continuous service, five days per week, that at many of the stations when really needed, the agent is not on duty when the train arrives and departs from the station. At 55 of the subject stations, there are no scheduled passenger trains serving the station. Train schedules ordinarily embrace the full period of 24 hours per day. Freight train service is maintained by-weekly at 25 of the stations.

The Commission at this time finds it unnecessary to decide whether to issue an order authorizing the closing and abandonment of the subject stations in that the effectuation of the central agency plan herein approved and ordered into effect will obviate so doing. The four hear-

ings held after due notice at three points in South Dakota, embracing 2054 pages of transcript, 79 Exhibits, plus oral argument have afforded a full hearing to all parties in interest. Savings from more economical operation of the railroad will react to the benefit of the general public in improved rates and service, and is in the public interest.

2. Central Agency Plan is Not Station Abandonment.

Abandonment of a station involves the withdrawal of the agent thereat, striking the station from the carrier's tariffs, removal of the depot building, and making no provision for the receipt or delivery of shipments at such point. The central agency plan proposed, in which two or more stations will be served by one agent, and by carrying the station in its tariffs, retaining the depot, and rendering central agency service for the receipt, dispatch and delivery of carload shipments, with less than carload shipments handled at the central station only, obviously does not constitute the abandonment of the station, or withdrawal of an agent therefrom, within the contemplation and meaning of Section 52.0932 of the South Dakota Code. The only change which central agency service contemplates is that the agent, whose service area is now confined to the immediate area surrounding one station, will have that area extended to include one or more adjacent stations, and less than carload shipments will be received and dispatched from the designated central agency station.

3. Is a Change in Conducting Petitioner's Business Reasonable and Expedient in Order to Promote the Convenience, Security and Accommodation of the Public?

Section 52.0202 South Dakota Code, supra, makes it the duty of the railroad company to conduct its business in such a manner as to promote the security, convenience and accommodation of the public. However, even without statutory direction, a railroad company owes a duty to

render adequate public service and to charge reasonable rates, and such duty arises from the nature of its business, and statutes so providing are merely declaratory of the common law. When wasteful practices and uneconomical and inefficient management causes a carrier to place itself in a condition which retards, or renders itself impotent to discharge these public obligations, it becomes the duty of this Commission to order and direct a correction thereof. The carrier cannot absolve itself from these public duties as a utility by asserting or excusing financial losses, due to improvident contracts, harmful to the public, with its employees or organizations thereof.

The record indicates that under the contract this Petitioner has with the Order of Railroad Telegraphers, where an agent is assigned to more than one station, he is required to be paid a full agent's salary at each additional station assigned to him without regard to the amount of work or the public need for such service. (We have examined these contracts, filed in this case as Exhibits 78 and 79, and fail to find any specific provision to the effect that a station agent's service area cannot be expanded to include one or more adjacent station areas. However, it is not within our jurisdiction to interpret these contracts.) In any case, this feature of the contract (if there be such) by reason of Petitioner's poor financial status, embraces its capacity to perform its public duties as a utility. A railroad has but one source of revenue and that is the rates charged for its service. Its rates must be reasonable. Reasonable rates cannot be realized when revenues are improvidently spent, even according to contracts with private parties or with its employees. Any contract made by a utility with its employees, when the terms thereof conflict with the public interests, are subject to the rights of the public. We believe there exists a conflict between the right of the public to reasonable transportation rates

and the rights of the parties under the contract entered into between the Petitioner and the Order of Railroad Telegraphers. A utility cannot, by private contract, displace and destroy the Commission's jurisdiction and statutory duties. To the extent that the Commission has jurisdiction over adequate rail service, an indispensable necessity in this state, our order directing the elimination of this feature of the contract will have the effect of releasing the Petitioner from its performance. This conclusion is supported by the decision of the Supreme Court of Colorado in *Denver & Salt Lake Ry. Co. v. St. Clair et al.* (28 p. 2d. 341) from which we quote:

"Contracts like the one before us are subject to the rights of the public; the contract involved in this suit, therefore, obligated the company and its successor, the defendant, 'to maintain a station' at the place designated unless and until the public interest requires its abolition or removal. In *Atlanta & West Point R. R. Co. v. Camp*, 130 Ga. 1, 60 SE 177, 15 L. R. A. (N. S.) 594, 124 Am. St. Rep. 151, 14 Ann. Cas. 439, the court thus stated the law that is applicable to this case: ' * * * When one contracts with a railroad company in reference to those matters where the public is involved, the contract is made subject to the rights of the public, and, when the exigencies of the business of the company are such that the rights of the public come in conflict with the rights of the contracting party under his contract, it is to be presumed that it was the intention of the parties that the private rights under the contract should yield to the public right. In applying what has been said to the present case, it cannot be held that the contract between the railroad company and the plaintiff was void per se, for the company has a right to make a contract with the plaintiff to locate a station at a given point, so long as the location of the station did not interfere with the proper discharge of the duties resting upon the company as a quasi public corporation; but the plaintiff was charged with notice of the character of

the person he was contracting with and the duties which that person owed to the public, and also, in reference to the subject matter of the contract, that it was connected intimately with the discharge of the duties the defendant owed the public, and therefore it became a part of the contract between the parties that the maintenance of the station at the point was limited, not by the time specified in the contract, but to that time, and to that time only, when, consistently with the discharge of the public duties of the company, the station could be maintained in the manner provided for in the agreement."

'When the public interest requires it, the station at Tolland may be abandoned, notwithstanding the contract, the United States Supreme Court said in *Manigault v. Springs*, 199 U. S. 473, 480, 26 S. Ct. 127 130, 50 L. Ed. 247; "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.''"'

See also Supreme Court of Appeals of Virginia in *Atlantic Coast Line R. R. Co. v. Commonwealth et al. State Corporation Commission*—(61 SE 2d, 5).

The situation in this case clearly justifies the issuance of a service order by this Commission directing the officers and managers of Petitioner to effectuate all economy possible in the operation of the railroad, including the inauguration of the central agency plan proposed.

We find:

1. That the revenue derived at the subject stations is obtained almost entirely from carload traffic which can be handled without material inconvenience by central agency service to the small number of carload shippers using rail service thereat.
2. That the less carload traffic for which agency service is most needed is a small volume, and the public has made

little use of less carload service at these stations, and the revenue derived therefrom is a very insignificant portion of the total revenue realized. The evidence submitted clearly proves that public convenience and necessity permits the withdrawal of agency service for less carload traffic at all the subject stations, not designated as area agency headquarters.

3. That the agent's work load as shown by statistics of record at subject stations varies from 12 minutes per day at Farmer to 2 hours per day at Oida, with an average work load of 50 minutes per station at the 69 subject stations.

4. That the maintenance of full-time agency service of 8 hours per day, 5 days a week, at full time pay is not required by public convenience and necessity at each one of the subject railroad stations and part-time service will avoid closing the stations completely.

5. That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates, and that an order be forthwith issued that the proposed central agency plan be effectuated.

6. That the provisions of the existing contract with the Telegraphers Union that an agent must be paid for full-time without regard to the amount of work at a station, and that an agent must be employed full-time at each small open station and receive full-time pay is in direct conflict with the public interest, the public duty of the railroad, and is not binding upon this Commission.

7. That the applicant be directed and ordered to eliminate the wasteful expenditure of its revenues in maintaining at each of said stations an unneeded full-time agent at full-time pay under the terms of said contract with the Telegraphers Union.

8. That the central agency plan proposed by applicant be approved and an order issued directing applicant to put into effect such plan under which one agent at one agent's salary perform the agency service at two or more of the subject stations, and that less carload traffic be handled at a centrally located station.

9. That the business now being handled at Cottenham, South Dakota, no longer requires the maintenance of an open station thereat even on a central agency basis, and that the agent be withdrawn therefrom and the station closed.

10. That the issuance of any order of consent by the Commission, permitting the applicant to close and discontinue agency service at the subject stations, (except Cottonwood) be held in abeyance subject to the further order of the Commission, awaiting the effectuation of a central agency plan under which part-time agency service will be continued at all the subject stations, (except Cottonwood).

11. That the final action on the petition, requesting written consent to wholly discontinue agency service, remove the station buildings therefrom and striking the stations from the carrier's tariffs, be deferred, subject to the further order of the Commission, for a period of 120 days from the date thereof, at which time applicant be directed and requested to submit to the Commission a report of the progress being made to centralize agency service and install part-time agency service at all of the subject stations involved in this proceeding. Such central agency service to be established at the stations as outlined in Exhibit 10, and in this report.

Let an order be so entered.

Dated at Pierre, South Dakota, this ninth day of May, 1958.

By Order of the Commission:

E. F. Norman,

(Official Seal)

Secretary.

At A Regular Session of the Public Utilities Commission
of the State of South Dakota, held in its offices, in the
City of Pierre, the Capital, this ninth day of May, 1958.

Present: Commissioners Doherty, Lindekugel and Merkle.

(Merkle dissents.)

In the Matter of the Application of
The Chicago and North Western
Railway Company for Authority
to Revise, Adjust and Rearrange
Its Agency Service in South
Dakota.

ORDER (F-2499).

On this date the Commission having completed its investigation and made and filed its report containing its findings of fact and conclusions thereon, a copy of which is hereto attached and made a part hereof, and the Commission being fully advised in the premises and sufficient cause for this order appearing; it is

Ordered, that the Chicago and North Western Railway Company be, and it is hereby, authorized and directed to forthwith inaugurate and put into effect its proposed central agency station plan embracing 68 stations as outlined in the report whereby one station agent, at one agent's wages, may perform the agency service at two or more adjacent stations, and that less than carload traffic be handled at the designated central agency stations only.

Ordered Further, that the Chicago and North Western Railway Company be, and it is hereby, authorized to withdraw its agent and close the station at Cottonwood, South Dakota.

Ordered Further, that the Chicago and North Western Railway Company's request for authority to eliminate agency service entirely and remove the depots from the other sixty-eight (68) stations involved in this proceeding be deferred, subject to further order of the Commission, for a period of 120 days from the date hereof, at which time it is requested and directed to submit to the Commission a report of the progress being made in inaugurating its plan for central agency service.

By Order of the Commission,

E. F. Norman,

(Official Seal)

Secretary.

Commissioner Chris A. Merkle Dissents.

I dissent from the findings, conclusions and order of the Commission. The application of the Chicago and North Western Railway Company should be denied, both because it is of such a nature as to be beyond our statutory power to consider and, secondly, because it is lacking in merit.

The applicant has presented its application and evidence in support thereof seeking consideration of its proposal to eliminate agency service and to remove the depot and other facilities at each of the 69 stations involved, and its alternative proposal for central agency service, on a state-wide basis. It has not treated, and the Commission was not asked to treat the application, as a series of applications with respect to each station individually. This is apparent from the application itself and was made explicit by the testimony of the applicant's chairman and chief executive officer (Tr. 51) and is emphasized by applicant's counsel in oral argument and brief filed at the time of oral argument.

The several protestants have raised a number of legal questions which they contend require, as a matter of law,

that all relief sought in the application be denied. These protestants assert that the very nature of the application and the consequent nature of the proceedings thereon are such as to exceed our statutory authority and limitations to consider. They point out that under SDC 52.0932, as amended, a railroad company is first of all prohibited from abandoning any station on its line of railroad when once established or to remove the depot or to withdraw any station agent therefrom. Protestants point out further that the Commission is then given defined authority to relax this prohibition by granting written consent after hearing and consideration of all the circumstances with respect to any particular station. Protestants claim that the statutory specification that the Commission must consider all the circumstances including the revenue derived by such railroad "from the incoming and outgoing business at such station," the railroad's expense of maintaining "an agent thereat," and public convenience and necessity involved, clearly indicate that our statutory authority is limited to considering applications for the abandonment of stations or the withdrawal of agency service on an individual basis only.

The protestants further contend that even if we have legal authority to entertain an application of the type here presented, it is nevertheless of such a nature as to render it impossible on any reasonable and practicable basis to hold the type of a hearing that the statute makes prerequisite to granting consent to the closing of the stations. Here again protestants point out the statutory language and argue that it clearly contemplates a hearing at or in the immediate vicinity of each individual station, so that all members of the community served by the station will be assured adequate opportunity to appear and make their service needs known and so as to permit consideration of the public convenience and necessity involved in continued

agency service or the abandonment thereof in connection with each individual station on its own merits and not primarily in relation to a state-wide or system-wide program.

Protestants further contend that the statutory requirement that we consider "the revenue derived by such railroad from the incoming and outgoing business at such station" requires the applicant to produce evidence showing the gross income to the railroad at the station, i.e., gross tariff charges minus the proportion of such charges accruing to other railroads through interline divisions. This, say protestants, has not been done. Applicant Exhibit 60 shows gross tariff charges collected at each of these stations for the year 1956 totaling \$8,027,606.00. Corresponding information for the years 1955 and 1957 (upon the request by protestants and resisted by applicant) was furnished after the hearing. The protestants, however, point out that this information does not show what the applicant's proportion of the gross revenue received was at each of the individual stations. Exhibit 66, on the other hand, which purports to give some data as to interline divisions, represents an allocation made on some accounting basis contrary to SDC 52.0932 that still does not provide the evidence which the protestants claim we are required, by the statute, to consider.

Protestants make yet another legal contention. They say that in many instances there is such a violent fluctuation in the gross tariff charges received for 1955, 1956 and 1957 that it is impossible to determine from the evidence submitted, on an individual station basis, which of the years, if any, is typical as to any particular station. There is evidence in this record that drought conditions in certain parts of the state and elsewhere in some years and abnormal situations due to wet weather in some parts of the state in some years, and other abnormal situations,

have operated to distort the revenue picture at particular stations in particular years. Consequently, the protestants argue that even if gross tariff charges (revenue) are the proper measure of station revenues, it is nevertheless impossible on this record to determine which years' revenue figures properly reflect the true revenue producing capacity at any particular station. Protestants further say and contend that perhaps the average railroad revenue for a series of years combined would be more accurate, rather than to just rely upon just one year's showing.

I am in accord with these contentions. If any one of them is valid, as I believe them to be, we are required by law to deny the application regardless of any other considerations. But even if it be assumed that I am wrong as to all of them, the record surely requires that the application be denied on its merits.

The applicant contends that station revenues are not necessarily a measure of the need of agency service. This is of course true. Station revenue is nevertheless one of the very important elements that the Commission is bound and must consider. We as a Commission are required by law (SDC 52.0932 as amended) to consider "all the circumstances." Among these circumstances, however, which the statute specifically requires us to consider is "the revenue derived by the railroad from the incoming and outgoing business and its expense of maintaining an agent" at the station. I repeat, consideration of the revenue derived in relation to the expense involved is one main and outstanding indication of the reasonableness of requiring the continuance of agency service or permitting its abandonment when considered together with the function performed by agency service. The ultimate conclusion must depend upon a balance of all the circumstances in arriving at a final judgment as to what public convenience and necessity requires or permits. My conclusion is based upon such considerations.

The evidence shows, and applicant contends, that the principal expense involved in maintaining agency service is the salary of the agent. These salaries vary somewhat between stations. The other expenses, heat, light, telephone, etc., are in any event relatively small at any station. For purposes of general consideration, the expense of maintaining agency service at the stations here involved (See Exhibit 10) may be considered to be in the neighborhood of \$5,000.00 per year. If the applicant's alternative proposal of so called central agency service were to be put into effect, its total savings would not be 69 times \$5,000.00, as there would be 16 agents and agencies retained and certain new expenses incurred. Applicant estimates its total savings, under those circumstances, to be about \$250,000.00 per year.

On the revenue side of the picture, according to this record, some of the individual stations here involved have produced annual revenue far in excess of the total savings attributed to the central agency plan in the entire state. Dallas, for instance, in 1957 produced revenues of nearly \$320,000.00. Onida in 1956 produced revenues of over \$267,000.00. Even Fort Pierre station in 1956 grossed almost \$195,000.00 and in 1957 Fort Pierre showed a gross of \$220,224.00 (See Exhibit 64). In 1956 ten of the 69 stations had revenues of over \$100,000.00, and 24 of the stations had revenues ranging from and between \$50,000 and \$100,000.

Looking at the lower end of the revenue scale, in 1956 the only three stations, Whitewood, Fairfax and Conde, had revenues of less than \$10,000. Two of these, Fairfax and Conde, each had revenues of over \$25,000 in 1955. Whitewood's revenue in 1957 was over \$12,000. There is thus no station in the 69 whose revenues did not exceed \$10,000 in at least one of the 3 years.

In addition to the 3 stations just discussed, there are

only 3 more whose revenues in 1956 were under \$15,000, Cottonwood, Wolsey and Valley Springs. The revenues in each of these 3 stations, for 1955, exceeded \$15,000.

In addition to the 6 stations already discussed above, only 4 more had revenues in 1956 of under \$20,000, Herrick, Monroe, Bonesteel and Quinn. Of these, all but Monroe substantially exceeded \$20,000 in 1955, Bonesteel exceeding \$55,000.

Stations not above discussed or mentioned had in 1956 revenues ranging from \$20,000 to \$50,000. Many showed substantially larger revenues in 1957 than in 1956; particularly notable are the increase at St. Lawrence from \$30,000 in 1956 to about \$80,000 in 1957. The increase at Harrold went from \$33,000 in 1956 to about \$100,000 in 1957.

Based upon these considerations, the relationship between station revenues and station expenses, it can certainly not be said to be unreasonable to require the continuance of agency service at most, if not all, of these stations if its continuance serves the public convenience and necessity. Besides the legal question here involved, the record leaves me in no doubt that public convenience and necessity require the continuance of this station agency service. A great variety of evidence was introduced at the hearing from shippers, consignees, and other businessmen and women, including civic representatives, all indicating that the service rendered to the public would be seriously impaired if this agency service were discontinued or the central agency plan put into effect. In the case of some of the witnesses the evidence merely indicated that shippers or consignees would be greatly inconvenienced by having the quality of their station agency reduced or cut out entirely. In many other instances, however, the testimony shows that businesses served by the applicant would be adversely affected, business and property values reduced,

and investments made in a community affected by the proposed plan impaired. Some witnesses indicated that their entire community might well dry up if this petition is granted.

The applicant expresses a definite preference for the institution of its central agency plan as against the closing of all stations. The application, however, is for an order of the Commission and authority to close all of the 69 stations in the first instance, with alternative permission to institute the central agency plan if found feasible with 30 days (120 days as now ordered in the majority decision herein) after authority to close is granted. The applicant admits frankly that its agreements now in full force and effect with the Order of Railroad Telegraphers, the collective bargaining agency and representative of the 69 agents here involved, and one of the protestants herein, do not permit it to introduce the central agency plan without securing revision of these labor union agreements. The testimony of the president of that organization, a Mr. G. E. Leighty, indicated that such revision of agreements with respect to the dualization of particular stations have some times been negotiated between individual railroads and the system committee representing the employees on such a railroad if investigation of conditions at the particular stations involved showed that the business done at the stations did not warrant the maintenance of full time agency service and one agent could service two stations, by spending about half of his time at each station daily, without undue hardship and under proper rates of pay and working conditions and without harm to the public interest. Leighty further testified, however, that wholesale dualization of stations doing volumes of business, such as is conducted at the bulk of these South Dakota stations, had never been agreed to, thus indicating a strong probability that the applicant would not find it feasible

to put the central agency plan into effect after authority to close these stations is actually granted, as now appears the case from the above order of Commissioners Doherty and Lindekugel. The improbability of the central agency plan being put into effect is further emphasized by the fact that at no time before or during the pendency of this proceeding has any representative of the applicant railroad company made any contact with any representatives of the Order of Railroad Telegraphers with a view to negotiate the necessary agreement revision. This circumstance, if it does not impair the good faith of the applicant's proposal, at least suggests that its purpose is to use the instrumentality of a Commission station closing order as a coercive device in negotiations with the Order of Railroad Telegraphers until such revision of agreements has been obtained. I do not feel that this Commission, or any regulatory commission, can with propriety lend the authority of the Commission to that end, either as it applies to a railroad or to any other public utility under Commission regulatory jurisdiction.

Applicant says that the savings to be derived from its proposed program of curtailing agency service will be devoted to better maintenance of branch rail lines and even main lines, better upkeep of box cars and the building of new box cars, etc., will all result in improvements of service to shippers located on branch lines and even on main lines. I am not convinced that these claims are valid. We have no way of being assured that the net gains, if any, to the applicant company derived from the proposed reduction of station agency service will be used for these purposes. The estimated gains, if fully realized, are admittedly trifling in comparison with the requirements for better maintenance of road and equipment and service. This record is replete with testimony as to the inadequacy of rail service being rendered by the Chicago

& North Western Railroad Company on its South Dakota branch lines and even on its main lines. Protestants say better and more reliable and dependable service would produce more business and thus serve the public better, and thus produce correspondingly more revenue for applicant company. Although applicant relies heavily on its judgment that many of the largest shippers affected by its proposal will have no alternative but to continue to use rail service and therefore expects no loss of business from this proposed curtailment of depot agent service; however, there is specific testimony, repeatedly stated, in this record from shippers and consignees establishing the fact that curtailment or complete discontinuance of agency service will undoubtedly result in diversion of traffic to other railroads and to other means of transportation. Even a relatively small loss of traffic would completely offset the savings the applicant anticipates. It is my considered judgment that upon the granting of this application there will be a sufficient diversion of traffic to other means of transportation to more than offset the anticipated savings. If that should occur I would expect that the loss in net revenue would be used as a basis for further curtailment of services and for further curtailing of maintenance and service on applicant's railroad in South Dakota. Such curtailment would in turn lead to further losses of business and revenue, and initiate a spiral inevitably ending in proposals to abandon at least some of its branch lines in South Dakota. Thus, it seems to me, the applicant's proposal would more probably lead to branch line abandonments rather than to the preservation of branch line service as claimed by applicant, all to the detriment of the public generally.

The applicant relies heavily on what it considers to be a statistical demonstration of wasteful practices through excessive payments for idle time on the part of the agents

at one-man stations. From station records it has extracted statistics of certain selected revenue-producing transactions which it calls "work units." It then calculates from these data the average daily time devoted by the agent at each station to the actual performance of duties and computes astounding payments for time actually devoted to duty. In so doing, in arriving at its computations, the applicant attributes an arbitrary 15 minutes of time to each work unit. I am convinced that this method produces results that have no relationship whatsoever to reality. The reasons for this conclusion could be discussed at great length. Perhaps a few indications will suffice. First and foremost, the statistical results are completely at variance with facts. Numbers of witnesses from various stations who are in a position to observe the activities of the agent daily have testified from their personal observation that the agent spends very much more time in the actual performance of station agency service than applicant's statistics show. Some witnesses characterized the statistical results as "fantastic." Secondly, the statistical method employed makes no allowance for the service rendered to the applicant by the agent being on duty throughout the business day to render service to railroad patrons when, as and if, the patrons seek the service. Another number of witnesses testified that in their own businesses they feel obliged to keep employees in attendance upon the need of the public even though such employees may not be constantly busy. Thirdly, it is in the very nature of an annual average that it completely excludes consideration of daily, weekly and seasonal demands of the business upon an agent's time. When public service demands a full 8 hours or more of attention on one day the rendition of that service is not facilitated by the fact that the agent may have nothing or very little to do on some earlier or later day. Fourth, these statistics are admittedly not

based on actual time studies at any station. If we are or if we were considering the traditional application for the closing of an individual station, it would be feasible to determine to what extent the agent's time is actually occupied. The very nature of the applicant's petition makes this impracticable in the instant case. One witness with quite extensive experience in the ascertainment of station work loads and efforts to devise formulae for computing work loads from station records testified on the basis of his experience that no reliable rule or measuring stick, or call it formula, of this kind could be devised. Tests showed that the results deviated widely in both directions from the results of actual time studies. This evidence was not challenged or refuted.

This unreliability of these work-unit computations in and of itself seriously undermines the applicant's case, since they are relied upon to show not only wasteful wage practices but volume of business, need for agency service, and relative annual fluctuations in business as well.

I am also greatly disturbed by the attitude of the applicant toward their obligations as a public utility. The applicant here asserts, on the one hand, that all phases of transportation have become highly competitive and that it is therefore necessary that railroads be given freedom to arrange their methods of doing business in a manner comparable to other business without "being tied down" so the testimony shows by federal or state laws and regulatory boards and commissions, rulings and restrictions. Yet, it appears from the record that other forms of transportation, such as air, highways, trucks, water, pipelines are regulated too, even the regulation of telephones, light, power, etc. The chairman and chief executive officer of the applicant company testified in substance that inevitably, the railroads must consider that competing forms of transportation will outstrip them in everything except

long hauls of carload commodities. Time after time, in applicant counsel's examination and cross-examination of protestant witnesses, it was indicated, on the one hand, that competing forms of transportation could better supply the services that the witnesses wanted from the railroad, and, on the other hand, that as to certain traffic, particularly carload shipments of grain to terminal markets, there would be no diversion to other forms of transportation because of the so-called in-transit rate privileges offered the shipper by the railroads, which gave the shipper no alternative but to continue to use rail transportation no matter how inconvenient or slow or inadequate the service might be.

In their majority report and decision in this case, Commissioners Doherty and Lindekugel have given approval to close up and remove the 69 depots in the 69 towns and cities located on the Chicago and North Western Railroad Company in South Dakota, and to discontinue all station agency service thereat unless protestants, Order of Railroad Telegraphers, will agree to the so called central agency plan of the applicant here promulgated and advanced. If any of the businessmen in such towns care to do any business the railroad by and through the station agent, these businessmen will have to travel all the way from 2 miles to as much as 35 miles to see and do business with a station agent. That in effect is the situation here. The testimony is plain to me that there will be no roving or traveling station agents provided. If any business is to be transacted with the railroad, it means that the businessman must come to the agent and not vice versa.

The Commission has never had such a case before it. According to applicant and its array of attorneys, this proceeding was commenced and prosecuted under the provisions of SDC 52.0932 as amended. Just think of it, 69 individual station agency cases were to be tried as one

case in one hearing. As I view it, there appears to be no provision under said Section of the Code for this type of procedure or hearing. I believe that under said law it contemplates and requires a separate and distinct hearing for each individual railroad station in South Dakota, such hearing to be held in the town or city in which such station is located or at some nearby town or city for convenience sake of holding a hearing. The Commission must keep in mind that separate findings are necessary as to each station and agent or agency involved, and each must be based and decided upon its own merits. A precedent is here sought to be established, which is unorthodox and not contemplated nor provided by law. This kind of blanket request and presentation does not satisfy the requirements of the statutes, nor does it by any means give the people, who and the public, a fair and adequate opportunity to be represented or heard.

Much has by me already been said about Work-Load. Much was testified to by applicant's witnesses as to the Work-Load of each depot agent in the 69 stations here sought to be eliminated. The amount of time allotted by applicant for the agent in each case seems so small that it certainly creates doubt in itself of its own validity. I certainly cannot bring myself to believe that some of applicant's agents spend as little as 12 minutes per average working day at Ferney, South Dakota, to a maximum of about 2 hours at Onida (Exhibit 5). Not one bit of testimony was given in this whole record to show work done, or time spent, by each station agent to work up, supervise, and complete a transaction. Every one of the witnesses who protested these depot closings testified that the agent is doing a good job for the railroad in his assigned community. A station agent is the railroad's ambassador of good will in his station-agency territory. Without an agent there will be no public relations work done or exist-

ing between the railroad on the one hand and the shipping public on the other hand in the various towns and cities here involved.

This record is full of testimony which shows that when and where agency service is discontinued and withdrawn, people in that community immediately seek other means of transportation, and usually get it, to ship their commodities in and out of their towns and cities. This record is full of testimony that the only money saved by the railroad company here is what it costs them to hire a station agent, plus heat, telephone, etc., at each one of said stations. This combined expense, let us say, averages about \$5,000 a year at each of said 69 stations. The money this applicant will lose after these stations are closed, or any one of them, except possibly a few of the very smaller ones, and the inconveniences brought about and the disturbances caused, will in my judgment amount to much more than keeping a station agent at the station. People nowadays know that other means of transportation is available to them, and this also includes grain elevator operators, and it is a certainty, even though the railroads offer so called in-transit privileges in the shipment of grain, that the applicant railroad will lose much more traffic and money by taking away these station agency services in these 69 towns, or a portion of them, than if they left them alone and operating.

Commissioners Doherty and Lindekugel, in their majority report (Page 5), say that "92% of all revenue of these 69 stations was consumed in paying operating expenses Other Than Station Expenses." That, to me means that even if all of the 69 stations are closed up and the facilities done away with, this 92% of the expense (of the revenue) will still be present and will always be present and recurring annually, depot agent or no depot agent. Mr. Doherty and Mr. Lindekugel say in their report (Page 8) that some

of the other large businesses, Peavey, Sexauer, Tri-State Milling, etc., were not present at the hearing to give testimony. They say "other type of testimony Which Is Conspicuous By Its Absence in this case is that of the large grain companies operating in this state." Such a statement should not even be made a part of this case nor any case of this kind. No such testimony exists in this record. Absence does not give consent to anything. This statement assumes that since these big elevator companies did not give any testimony, they, by their absence from the hearings, acquiesced in the proposal of applicant railroad company.

Reference in the majority report, was also made to SDC 52.0202. It is but partly quoted in the majority decision above. Upon reading this entire Section of the Code, it would appear that SDC 52.0202 defines the general regulatory powers of this Commission, where the Commission must, upon due investigations, require a common carrier of this state to do something. A railroad is a common carrier as defined in SDC 52.0201. SDC 52.0202 is not applicable here, nor can it be applied in a station agency case where we have a specific law on the subject matter, SDC 52.0932. SDC 52.0932 only applies to discontinuance of station agency service and removal of depots and this law lays down certain requirements to be met before a railroad is entitled to such discontinuance of station agency service. It is a specific law covering one subject only and not a general law, and this section we must follow and not 52.0202. However, in following SDC 52.0932, a separate application and a separate hearing as to each individual station is contemplated. It was never intended that more than one application (69 in the instant case) be heard at one time. Our laws are undisputed, I believe, that where a specific law covers a subject matter in detail, it must be followed and such a specific law takes

precedence over a general law. Therefore, I repeat, SDC 52.0202 is not applicable here.

In their majority report and decision the other two Commissioners make much that the Chicago and North Western Railroad Company sustained a deficit of \$5,529,297 in 1956. However, nothing was said that in 1957 this same applicant only sustained a deficit of \$414,524. According to that rate, it may well be that a net profit may be realized in 1958.

Pages 5 and 6 of the majority Report agreed to by Doherty and Lindekugel shows, in detail, the names of the several stations in South Dakota located on applicant line of railroad; the second column shows total revenue of each station; the third column shows "Expense Other Than Station Expense;" and the fifth column shows "Station Expense." Again I wish to call attention to the fact that the column headed "Expense Other Than State Expense" is an annual recurring expense whether station agency service is given or not. Pages 5, 6, and 7 are supposed to show the total revenue derived at each station assignable to said station. But look at Exhibit 60 and compare. This Exhibit shows a gross income for 1956 amounting to \$8,027,606.00.

Let us look at the Fort Pierre picture again. The testimony by applicant's witnesses shows that the station at Fort Pierre, in 1956, took in and collected \$176,582.00. This is the only railroad station where the figures, as submitted and testified to by applicant and their witnesses, were challenged by businessmen and witnesses from Fort Pierre including applicant's own depot agent. These figures, after the mistake was discovered, were, by agreement of the attorneys, changed so that the total gross income at Fort Pierre for 1956 was \$194,016.00, an admission of a mistake of a mere \$17,500. For 1957 (Exhibit 64) it shows an income at Fort Pierre of \$201,872 for 11 months. For 12 months, on the same basis, it would be \$220,224.00.

(\$201,872 divided by 11 months times 12 months). Could it be, if fully investigated, that this railroad company made similar mistakes in their figures at the other stations here under consideration? Only one station, in figures, was challenged and that was off about \$17,500. Is it fair to the shipping public to ask for discontinuance of station agency service at a station that has a total intake of revenue of almost \$200,000 in 1956 and \$220,224 in 1957? Now, Fort Pierre, on account of its close proximity to the Pierre station, may be a station that perhaps could be run and operated by the depot agent from Pierre provided it would not increase the number of employees at Pierre station in order to do both jobs. When the total intake at a station is around \$200,000 annually, as at Fort Pierre, it would not appear to be the fair and economical thing to do for this railroad to ask for discontinuance of agency service. It may well be, after Oahe Dam is completed or nearly completed, receipts at Fort Pierre will greatly diminish, but right now should not be closed.

Again I say this application of the Chicago and North Western Railway Company should not be allowed under present situations. If there is need to close up some of their smaller stations here and there over the state, let the railroad company file such an application and a hearing thereon can and will be held to determine if the railroad company is entitled to the relief as provided for under SDC 52.0932. Other railroads operating in South Dakota have always followed that procedure.

I, therefore, cannot agree with the majority commission opinion herein, and I hereby make and file this dissenting opinion and statement.

Chris A. Merkle,

Commissioner.

Public Utilities Commission
of the State of South
Dakota.

PLAINTIFF'S EXHIBIT NO. 2-A.

**Office of the Secretary
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA**

This Certifies, That I have on the 22nd day of August, 1958, compared the hereto attached copy of instrument known as Order Denying Rehearing in the matter of Rearranging and revising station agency service in South Dakota, by the Chicago and North Western Railway Company, in Public Utilities Commission, Docket No. F-2499 with the original now on file with me, as Secretary, and the same is a full, true, correct and identical copy of said original and of every part thereof.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the Public Utilities Commission of the State of South Dakota, at Pierre, the Capital, on this 22nd day of August, 1958.

**E. F. Norman,
Secretary, Public Utilities Commission,
State of South Dakota.**

(Official Seal)

At a Regular Session of the Public Utilities Commission of the State of South Dakota, held in its offices, in the City of Pierre, the Capital, this 13th day of June, 1958.

Present: Commissioners Doherty and Lindekugel.

(Merkle dissents.)

In the Matter of the Application of
the Chicago and North Western
Railway Company for Authority
to Revise, Adjust and Rearrange
Its Agency Service in South
Dakota. } (F-2499)

ORDER DENYING REHEARING.

On the 9th day of May, 1958, the Commission issued its Report and Order in Docket F-2499, involving the Centralization of Agency Service at numerous stations on the Chicago and North Western Railway Company's lines in South Dakota, to which Report and Order, reference is hereby made.

On the 21st day of May, 1958, the Order of Railroad Telegraphers filed with the Commission a formal petition for rehearing; on May 26, 1958 the cities of Wessington Springs, Hitchcock, Athol, Houghton, Bonesteel, Mansfield and Northville jointly filed a formal petition for rehearing; and, on June 2, 1958, the cities of Hartford, Humboldt and Montrose, jointly, and the cities of Carthage and Canova, jointly, filed formal petitions for rehearing; and on June 7, 1958, the cities of Hermosa, Quinn, Oral, Buffalo Gap, Oelrichs, New Underwood, jointly, and Astoria, singly, filed formal petitions for rehearing; and on June 9, 1958, the town of Wood, singly, and the Farmers Co-operative Association of Dallas filed petitions for rehearing; and all applicants, except Wood and the said Co-operative

Association requested suspension of the Order issued in Docket F-2499, during the pendency of the petition for rehearing if granted.

Each of the several petitions filed after May 21, 1958, except Wood, and the Farmers Co-operative Association incorporate therein by reference the petition for rehearing filed by the Order of Railroad Telegraphers.

In disposing of these applications, the Commission deems it important to re-emphasize the precise nature of the Order it has entered. What it has done is to authorize and direct the carrier forthwith to place in effect the Central Agency Plan; and, pending further report by the carrier as to the actual operation of this Plan, it has deferred action upon the carrier's request for authority to abandon entirely the stations in question.

This Order is directed only to the carrier; and the carrier has acted to place it in effect. The Commission has thus far had no evidence whatsoever of any adverse effect upon shippers which would warrant withdrawal of the Order or suspension of its operation.

The Applications for Rehearing are founded in large part upon alleged contractual limitations upon the carrier which, if they do in fact exist, might interfere seriously with the economies and efficiencies to be realized by the carrier through the Central Agency Plan. The carrier, against whom this Order is solely directed, has not relied upon any such alleged contractual limitations as a reason why it should be excused from compliance. The effect of such limitations, if any do exist, presumably will be reflected in the report to be rendered by the carrier at the end of the 120-day period, at which time the Commission is to give further consideration to the carrier's request for authority to close the stations involved..

In its Report the Commission expressly stated that whether such contractual limitations as are alleged to exist,

do exist in fact, depends upon the proper interpretation to be given to the carrier's contracts—and we stated that this was beyond the Commission's province and jurisdiction. Reaffirming this view, we note that there were contained in our Findings and Order certain statements which make it appear as if we had interpreted these contracts, and which, in any event, are unnecessary to the exercise of the statutory power upon which our Order was based. Accordingly we deem it desirable to clarify, and we hereby amend our Findings and Order so as to eliminate and modify any statement therein which may be construed as an adjudication of the validity of or an interpretation or application of any labor agreement, or as a directive to violate any contract which may in fact exist or to circumvent the Railway Labor Act in connection with the execution of our Order, by eliminating Findings Nos. 6 and 7, and the words "at one agent's salary" in Finding No. 8, and the words "at one agent's wages" in the first ordering paragraph of our Order.

The Commission having considered the allegations of the several petitions for rehearing and reviewed the record in this proceeding; it is therefore

Ordered, that all Petitions and Applications for rehearing in Docket F-2499 be, and the same are, hereby denied.

By Order of the Commission:

E. F. Norman,

Secretary.

(Official Seal)

PLAINTIFF'S EXHIBIT NO. 3.

State of Iowa,
Office of the Iowa
State Commerce Commission. } ss.

I, Leo F. Wolfinger, Secretary of the Iowa State Commerce Commission, certify that attached hereto is a true and correct copy of Decision and Order, dated August 11, 1958, "In the Matter of an Application of the Chicago & North Western Railway Company for Authority to Revise, Adjust and re-arrange its Agency Service in Iowa, Docket A-5726.

In Testimony Whereof, witness my signature and the seal of the Commission at Des Moines, Iowa, this 21st day of August, 1958.

L. F. Wolfinger,
Secretary.

(Seal)

BEFORE THE IOWA STATE COMMERCE COMMISSION.

In the Matter of an Application of
the Chicago and North Western
Railway Company for Authority
to Revise, Adjust and Rearrange
Its Agency Service in Iowa. } Docket
No. A-5726.

Hearing held at Des Moines, Iowa, March 18-21, 1958,
inclusive, and recessed to Denison, Sioux City, Algona,
Cedar Rapids and Des Moines. Oral arguments held July
2, 1958.

DECISION AND ORDER.

August 11, 1958.

Appearances:

For the Applicant—Chicago & North Western Railway
Company—

Frank W. Davis and Ray H. Johnson, Jr., Attorneys,
1115 Bankers Trust Building, Des Moines,
Iowa, and

F. O. Steadry, Attorney, 400 W. Madison St.,
Chicago, Ill.

Appearing on behalf of all protestants generally:

Conrad A. Amend, Commerce Counsel.

Robert R. Rydell, Assistant Commerce Counsel
and

Richard S. Hudson, Assistant Commerce Counsel,
State Capitol, Des Moines, Iowa.

Appearing on behalf of the Order of Railroad Teleg-
raphers—Protestants—

Lester P. Schoene, Attorney, 1625 K Street, N. W.,
Washington, D. C.

C. O. Griffith, Attorney, 3860 Lindell Blvd., St. Louis, Mo.

G. E. Leighty, President, 3860 Lindell Blvd., St. Louis, Mo.

B. N. Kinkead, Vice Pres., P. O. Box 897, Parkersburg, W. Va.

R. C. Williamson, 1703 Daily News Bldg., Chicago, Ill.

Appearing on behalf of the Railway Brotherhoods of Iowa, protestants—

Frank J. Lynott, 308 Teachout Bldg., Des Moines, Iowa.

Appearing on behalf of the Brotherhood of Railway Clerks, protestants—

Claude E. Davis, 2925 Easton Blvd., Des Moines, Iowa.

Appearing on behalf of the Order of Railway Conductors and Brakemen, protestants—

John L. Sheeley, 110 Linn Street, Boone, Iowa.

Appearing on behalf of the Ogden Grain Elevator, Danilson Elevator and other shippers in Ogden, Iowa, protestants—

Stanley R. Simpson, Attorney, Ogden, Iowa.

Appearing on behalf of the Town of Beaver, Iowa, and Farmers Elevator Cooperative, Scranton, Iowa, protestants—

A. V. Doran, Attorney, Boone National Bldg., Boone, Iowa.

Appearing on behalf of Ralston Cooperative Association, Ralston, Iowa, protestants—

Francis L. Cudahy, Attorney, Jefferson, Iowa.

Appearing on behalf of Concrete Materials and Construction Co. and Concrete Materials Company, protestants—

Donald R. Wigton, Box 790, Cedar Rapids, Iowa.

Appearing on behalf of the Town of Ringsted, Iowa, protestant—

Francis Fitzgibbons, Attorney, Estherville, Iowa.

Appearing on behalf of Loveland Elevator Company, Missouri Valley, Iowa, operating at Modale, Missouri Valley, Loveland, and Council Bluffs; and California Grain and Lumber Company, California Junction, Iowa—protestants—

K. C. Acrea, Attorney, Missouri Valley, Iowa.

Appearing on behalf of the Town of Lake View, Iowa—protestant—

Robert G. Logan, Attorney, Lake View, Iowa.

Appearing on behalf of Walter Noack and Ralph Dierenfield, West Side, Iowa—protestants—

Erwin H. Hansen, Attorney-at-Law, Manning, Iowa.

Appearing on behalf of the Town of Vail, Iowa—protestant—

J. H. O'Connor, Attorney, Vail, Iowa.

Appearing on behalf of Whiting and Linn Grove, Iowa—protestants—

Richard Rhinehart, Attorney, 336 Davidson Bldg., Sioux City, Iowa.

Appearing on behalf of the Kingsley Community Club, Oltman and Phelps Bank, Kingsley Lumber Company, Page Lumber Company and Farmers Elevator Company, all of Kingsley, Iowa—protestants—

Wallace W. Huff, Attorney at Law, 314 Security Bldg., Sioux City, Iowa.

Appearing on behalf of Salix, Iowa—protestant—

William A. Shuminsky, Attorney, 809 Security
Bldg., Sioux City, Iowa.

Appearing on behalf of Farm and Town Lumber Com-
pany, Farmers Cooperative Grain Co. and Steel-
man Cob Co., all of Dumont, Iowa—protestants—

Frank N. Enbusk, Attorney at Law, Mason City,
Iowa:

Appearing on behalf of Cartersville Elevator, Carters-
ville, Tyden Feed Co., Dougherty and Farmers Co-
operative Elevator Co., Dougherty—protestants—

B. C. Sullivan, Attorney at Law, Rockford, Iowa.

Appearing on behalf of Dolliver and Fenton, Iowa—
protestants—

F. J. Kennedy, Attorney, Estherville, Iowa.

Appearing on behalf of the Town of Lone Rock, Lone
Rock Cooperative Elevator; Kossuth County Imple-
ment Co., Blanchard Lumber Co. and Lone Rock
Bank—protestants—

Leo J. Cassel, Attorney at Law, Barry Bldg.,
Algona, Iowa.

Appearing on behalf of the Town of Bancroft, J. H.
Welp Hatchery and other enterprises, Thompson
Yards, Murray Elevator and Mrs. R. S. Under-
kofer—protestants—

J. D. Lowe, Attorney at Law, Algona, Iowa.

Appearing on behalf of protestants in Calamus, Grand
Mound, Chelsea, Mechanicsville, Wheatland, Stan-
wood, Fairfax and Norway, Iowa—protestants—

Warren C. Ackley, Attorney, 705 Higley Bldg.,
Cedar Rapids, Iowa.

Appearing on behalf of Clarence, Iowa—protestant—

Durwood W. Dircks, Attorney, Davenport Bank
Bldg., Davenport, Iowa.

Appearing for Farmers Cooperative Company, A. Moorehouse Company, Glidden Farm Equipment Co., Thomas Connor, Quality Egg Marketing Cooperative, all of Glidden, Iowa—protestants—

O. B. Overholt, Attorney at Law, Glidden, Iowa.

Appearing for the Town of Stratford, Iowa—protestant—

Lloyd Karr, 711 Des Moines St., Webster City, Iowa.

The Chicago & North Western Railway Company on January 24, 1958, filed a petition requesting authority as outlined in the following paragraph. Notices were thereafter posted at stations as required by statutes and rules of this Commission. Hearing was held at Des Moines, Iowa, on March 18-21, inclusive, at which time the testimony of the applicant was presented. The hearing was thereafter recessed to Denison, Sioux City, Algona, Cedar Rapids and Des Moines for the purpose of hearing objectors to the petition. At the conclusion of hearing on June 6, 1958, this matter was taken under advisement upon completion of oral argument of appearances of record. Oral arguments were heard on July 2, 1958.

The petitioner requested (1) authorization to withdraw and discontinue agency service and to remove and retire depot facilities at 111 Iowa one-man stations: (2) authorization to inaugurate and establish the central agency plan set forth and described in the petition in lieu of the relief requested in No. 1 above, if within 30 days following the issuance of an Order granting relief, arrangements can be completed which will permit the petitioner to effect the economies contemplated by such program and (3) the ordering of such further and different relief as the Commission deems appropriate.

The applicant on the first day of hearing on March 18, 1958, amended its petition in the following respects:

1. Eliminating the stations of Lisbon, Luverne, Onawa, Missouri Valley and California Junction.
2. By substituting Ceylon, Minnesota, as a central agency instead of Dolliver, Iowa.
3. By making Ankeny a central agency with Sheldahl as an associate station of Ankeny instead of Des Moines.
4. By eliminating Webster City and substituting Eagle Grove as a central agency.
5. By making Danbury an associate station with Mapleton as a central agency instead of Ida Grove.
6. By making Blencoe a central agency with River Sioux as an associate station of Blencoe instead of Mondamin.

A written amendment to its petition was filed by the applicant railroad company on June 24, 1958, showing that the Interstate Commerce Commission had issued a Decision and Order authorizing the abandonment of the segment of line between Belle Plaine and What Cheer, Iowa, effective July 16, 1958, unless the Order was stayed. The Order became effective on the date last above mentioned. The stations at What Cheer, Deep River and Hartwick on this segment of railroad are involved in the subject matter herein and as a result of the above mentioned action are withdrawn from consideration.

The net result of the changes is that there are 105 stations for consideration of which 27 would become central agencies and thus 78 associate stations.

Attached hereto and made a part hereof is Appendix "A" showing stations in program after amendment of petition divided into those proposed for withdrawal of agency service and those proposed as central agency stations.

Attached hereto and made a part hereof is Appendix "B" quoting appropriate statutes considered applicable to this proceeding.

During the first four days of hearing witnesses for the railroad testified concerning the condition of the property in 1956 when it came under new management and the changes and betterments which have since been made and which are contemplated when funds are available; and that one means of obtaining such funds was by the reduction or elimination of non-productive endeavors, with particular emphasis on the reduction of one-man station service systemwise, and particularly in Iowa.

The financial condition in 1956 was described as desperate with \$11 million loss in the first six months and \$5½ millions loss at the end of that year; that track structures, buildings, equipment, rolling stock and motive power showed high deterioration; that personnel attitude was poor; that repair, accounting and many practices were obsolete; that of each dollar, 59¢ was being used for wages and salaries, which was higher than comparable Class I railroads serving similar areas; that it is a debit railroad as respecting boxcars, resulting in large rentals for cars for its use; that rate increases in recent years have not resulted in any appreciable increase in revenues due to loss, erosion and diversion of traffic; and that nearly all the freight earnings were being used to subsidize passenger operations, rather than for maintenance, improvement and new equipment. The management had become convinced that the railroad was pricing itself out of the market rate-wise.

As a result of studies and application to the regulating agencies losing passenger operations have been materially reduced; pick-up and delivery of l.c.l. has been discontinued; the 1200 units of steam and diesel motive power

have been reduced to 700 and the road completely dieselized, including all branch lines, without purchase of new power and with resultant elimination of coal and water facilities, backshops, etc. A central car repair shop has been built at Clinton to consolidate 14 repair shops previously located at different places. Yards have been revised, and consolidated and station expenses reduced at other than one-man stations where the company had jurisdiction to do so. Reduced schedule time for trains has been inaugurated. A highway crossing protection program will result in two million dollars savings annually. In some special situations rates have been reduced to retain and attract shipments to the railroad. The track structure has been improved and maintenance mechanized. The accounting department has been modernized and the departmental organization of the railroad eliminated. In each of the last two years one million dollars has been expended for betterments. Land has been purchased, and efforts are being made to attract new industries to increase carloadings.

It was stressed that there has been a revolution in the past few years in transportation which has been brought about by the advent of trucks, automobiles, good roads, airlines, barge and pipelines, all of which have had an impact and have reduced the volume of shipments and number of passengers, particularly on branch lines which compose 43.1% (602 miles) of the Iowa total mileage of 1396 miles. Efforts have been made and are being continued toward making savings on branch lines, among them the elimination of non-productive agency service, which savings can be used to improve track structure and thus increase the train speeds and to build new cars and repair older ones so that these feeder lines can be retained.

Much statistical information, other than that directly

relating to stations, was submitted. The following shows results in Iowa for a ten year period 1947-1956:

Tons of l.c.l. freight carried.....	61 % decrease
Passenger train miles.....	70 % decrease
Freight train miles.....	39 % decrease
Passengers carried.....	70 % decrease
Carloads of agricultural products...	30 % decrease
Carloads of animals and products...	41 % decrease
Freight operating revenue.....	3.4% increase
Passenger operating revenue.....	74.8% decrease
Freight rate increases.....	68 % increase
Total revenue carload traffic.....	13.7% decrease
Originating and/or terminating car- loads	25.1% decrease
Revenue T.M. per mile (Index 1947=100)	90

Unit costs for cars of all types have risen approximately 50% since 1947, materials and supplies 70% and wages 82%. 99.50% of freight operating income was absorbed in 1956 by passenger losses. In 1957 the l.c.l. shipments were down 89% from 1947 with the prophecy that within a few years there will be none of this traffic. In Iowa, 34.5% of cars originate and terminate and 65.5% are bridge traffic, the latter requiring little, if any, station service.

The number of employees in one-man station service in Iowa was reduced 27% in the period 1947-1956. In the latter year there were 151 employees located at 143 one-man and 4 two-man stations. Most of the reduction occurred at multiple man stations. The purpose of the program was to reduce such services, not only to accomplish a reduction of expense on branch lines, but as well on main lines at points where such service was considered excessive in relation to public need.

Under the proposed plan 105 stations would be discontinued with 27 of those stations reopened as central

agencies, thus leaving 78 to receive service as associate stations. The associate stations will be serviced by the central agencies. They will not be removed from the tariffs and will not be prepaid. The agent at the central agency will travel to the associate station or stations as regularly and as frequently as business requires. He will accommodate the patron in the matter of signing bills of lading, loss and damage inspection claims or any personal attention needed by a shipper at an associate station. The ordering of cars, obtaining information, quotation of rates and other services can largely be handled by telephone with charges absorbed by the railroad company. The average distance between stations is 8.4 miles. The central agent will be paid auto mileage for his travel between stations. He will advise consignees of shipment arrival. He will collect freight charges. Sign drafts with bill of lading attached can be conveniently handled. The usual and regular agency service will be offered at the central agencies. The central agencies are chosen on a number of factors, among them geographical location, number of persons served, physical condition of property, railroad operational requirements, highway conditions, competitive transportation, etc. Revenues were not taken into consideration in the determination. The l.c.l. shipments to and from associate stations will be handled at the central agency; also express and Western Union, if the companies offering those services so elect. The estimated annual net savings is \$391,000. The objective of the whole plan is to recognize changed transportation and economic conditions and enlarge the area of service that an agent can give from a central agency.

It was testified that commodities requiring agency service have decreased 89% since 1947, particularly l.c.l.; that passenger business at the stations involved has decreased almost to the vanishing point. There is passenger service

at only five of the stations. A comparison was made of train service in 1910 with that of the present time with a result that it showed that the large amount of freight and passenger service, persons and goods handled has been reduced at the branch line stations and at most of the main line ones to freight daily or tri-weekly or bi-weekly and that in many events the train passes the station while the agent is not on duty. Under the changed train operations the agent is no longer an essential in the direction of train movements. Most of the carload traffic now consists of grain outbound, coal, lumber and other merchandise inbound. 90% of the cattle outbound move by truck. There is a limited amount of western cattle inbound for feeding. The average carloads per station per day for the stations involved in the program is 1.4. The average agency hours per revenue car is 6 with average wages paid per revenue car \$12. and average wages paid per hour actually worked \$13. The total hours on duty actually worked is 17%. The present average station work load per work day is 1' 14", which is a decrease of 28% from 1951 and the estimated average work load under proposed program would be 3' 15". The average l.c.l. per day was one shipment in 1957; 1.8 in 1956; and 2.2 in 1955.

The work load of a station was arrived at by assigning 15" to each transaction and duty performed by the agent during a year, including the handling of express and Western Union. The amount of work units for the year was divided by 255 (the number of work days) thus producing the number of work units per day. The latter sum multiplied by 15" produced the average station work load per work day in hours and minutes. This information was produced for each station in the program and compared with the work load at the same station in 1951. Even though the agent is paid extra compensation by express and Western Union for handling those services, yet the

work units for that service are a part of the total as calculated and shown by the railroad company.

After hearing the applicant testimony in Des Moines, the hearing was recessed to reconvene at Denison, Sioux City, Algona, Cedar Rapids and Des Moines for the purpose of hearing protestants. There appeared at these locations 160 witnesses from 66 of the 108 communities, who offered testimony in opposition to the proposal. In all 2591 pages of testimony was produced and 105 exhibits were introduced. There were 39 objectors from 14 communities where central agency service is proposed. Of the 161 objectors there were 101 or 63% who testified concerning elevator, grain and lumber operations or lines closely associated therewith. The remaining protestants represented a large variety of business and industry interests.

The testimony was voluminous and much of it was of necessity repetitious. It was largely directed to the need for agency service directly in the communities. Many reasons were advanced, the most common being the need of the agent for ordering, tracing, inspecting, spotting, sealing, reconsigning, furnishing rate-and other information, verifying and making claims for loss and damage, determining demurrage, inspection of loading and lading, furnishing information relative to arrival of train, handling l.c.l., collecting charges, signing bills of lading, sending and receiving telegrams and express shipments. In many cases it was claimed that the local agent's services were available after his regularly assigned hours and that this was beneficial to them. In practically all instances there was objection to the necessity of traveling to the central agency to obtain l.c.l. and express shipments and of contacting an agent at another location, they alleging that they would be unable to locate him when they desired service; also that in many instances the telephone service was

either poor or it was necessary to wait an undue length of time to complete a call.

Many of the complaints of carload shippers, particularly grain and elevator, concerned the obtaining and forwarding of a signed bill of lading on the day a car is loaded and ready for movement. Many of them load until late in the day and though this could not be accomplished unless the agent was present and the loading was during his scheduled working hours. This was particularly true of the loading of Commodity Credit corn, which composes an estimated 75% or more of all such movements. In the course of the hearing a letter addressed to the Chairman of this Commission by the Commodity Credit Corporation was read into the record, it stating in brief that a delay of one day in forwarding bill of lading would not work an undue hardship and that they had been advised by a proper representative of the Chicago & North Western Railway Company that in some instances cars may be released one day and the agent sign the bill of lading the following day, with it bearing date of actual release.

Much civic pride was evidenced with emphasis on the desirability, convenience and necessity of having local agency service to attract new industries to the communities as well as for the direct benefit and accommodation of the shippers and users of railroad service.

Discussion.

We feel that we do not need to here enter into an extended discussion of the authority conferred upon this tribunal by statutes as shown in attached Appendix "B". The three sections 474.15, 474.16 and 474.17 were enacted to specifically give this Commission jurisdiction in matters relating to railroad stations and agencies and they specify the general manner of procedure on the part of the railroad company as well as of this Commission. The company

followed the outlined procedure contained in Section 474.15. Objections were filed by a large number of directly affected persons as permitted by Section 474.16. As heretofore stated, a time and place for hearing was named, and all protestants and communities were duly notified more than the statutory time in advance of the date of hearing so that they could appear and be heard, if they so desired. Section 474.17 gives to this body the discretion of prohibiting the abandonment or discontinuance of a station or agency, or the removal of the depot, or to *make such other order as is warranted by the evidence produced at such hearing.* By this language it was certainly not the intent of the Legislature to limit or bind this body to a hard and fast procedure, but to permit it to use discretion and judgment in its findings, only limited by the evidence. Three alternatives were contained in the petition of the applicant. We can make a finding based upon any one of them or on any combination thereof. We find that the authority conferred by statute is completely sufficient for us to make a finding in this matter.

We will have occasion in our conclusions and order to diverge from the prayer of the company to an extent necessary to properly adjudicate the matter. We feel free to do so within the confines of the evidence.

It was made clear in our Docket A-5644, Minneapolis & St. Louis Railway Company, and other companion cases dealing with station services decided in September, 1957, that any order must be based on "the public interest", or "public convenience and necessity"; that is, the public interest of the state or the public interest of the people of the state.

The public welfare of a considerable number of people of Iowa is affected by the proceeding. It is plain to this Commission in reviewing the powers granted by the Legislature of this State that its authority covers broadly a multitude

of transportation problems. A large portion of the evidence in the matter now before us is concerned with individual inconvenience more than actual public convenience and necessity. Throughout the hearing endeavor was made to confine the evidence to that which showed the need and the convenience and necessity for the agency services under consideration. Anyone appearing in protest should be prepared to prove that a genuine public need exists and that it cannot be met by the proposed plan. Public convenience is the criterion. The convenience ultimately to be served is that of the economic area to which a carrier is committed. A small amount of public inconvenience cannot justify the imposition of unreasonable costs which adversely affect the rate paying public, as well as the carrier itself.

The maintenance of existing services by a carrier must be balanced against the loss of public convenience which will result from a proposal. The inconvenience, if any, on a few individuals, and not on the public, must be compared with the burden imposed on the carrier in handling the business. In common with all other public enterprises operating under a profit system the applicant is compelled, by economic necessity, to curtail inefficient operation. In addition thereto, as a railroad carrier operating in interstate commerce, it is obligated to effect all possible economies, even though it remains subject to state authority with respect to a matter such as the one here under consideration.

No essential service will be discontinued at the associate stations. The only inconvenience will be that the usual duties normally performed by a local agent will be taken care of through the central agency, either by telephone or personally by the agent travelling to the associate station. It is simply a broadening of the service area of one agent to include one or two other nearby stations. The modernizing of transportation and communications has made this

readily possible in this field as it has in most all other ones. Public convenience and necessity have not been materially affected in other industries and neither should it be, nor is it, in our opinion, in this particular area of service.

This Commission has stated its position in the above referenced Docket as well as in other preceding opinions concerning its lack of authority over contractual relations of employer and employee and we here reiterate that position.

We have also heretofore stated that the need, or lack of it, for agency service cannot be established on the basis of revenues alone. The applicant herein did not base its case on revenues produced or not produced at a station but on the extent to which the public uses the services of the agents and the actual time worked in order to handle the business. The gross tariff charges are not a reliable indicator of public need of agency service. They do not accurately reflect the activity at a station. Such revenues are determined largely by the length of line haul and the value of the lading, neither of which are indicative of the amount of agency work performed. The exhibits in evidence show a variation in carload charges from \$98 to \$455 with an average of \$271. The agency work is the same for the one as for the other. The more accurate barometer of public need for the service lies in the number of transactions handled by an agent. We believe this is the preferable manner of determining need and that it offers a fair and reasonable picture of the actual amount of work required of an agent. The summation of the transactions for a year leads to an average per day, or when transcribed into time, to an average of hours and minutes used per day. It is realized that there are days when many loadings will be made and consequently the time used will be increased. There will also be days when little time is used. Where the average is already seemingly high, we are taking into

consideration, in some exceptions hereinafter made, that the work load on some days will exceed the average.

It was stressed by the applicant throughout the hearing that flexibility is the keystone of the proposed plan. This is as it should be. In order to be completely successful over an extended period of time, it must be adaptable and able to conform to changed or changing conditions. It is probable that upon adoption of the proposed plan there will be need in actual practice for some adjustments. In the future it may be that, for instance, an associate station will so increase its shipments and agency needs that it will be desirable to make it the central agency or even an independently operated agency. In such an event the plan must be flexible enough to permit the change. The authorizing of the central agency plan as hereinafter set out is with the understanding that in the event complaints are received by us regarding inadequate or unsatisfactory service at stations we will exercise jurisdiction in the matter of adjustment or correction. It will in all events be expected that the offered service as outlined in petition will be furnished.

Another phase of the program appears worthy of comment. Abandonment of a station involves the withdrawal of the agent thereat; striking the station from the carrier's tariffs, removal of the depot building, and making no provision for the receipt or delivery of shipments at that point. The program as proposed does not take the character of complete abandonment or discontinuance of agency service. Those stations named as associate ones will not be prepaid nor will the tariffs so provide as relating to carload service. Carloads, which produce practically all the revenues, will move into the station in the same manner as previously, either prepaid or with charges collect. Among objections was the possibility of inbound cars not being properly spotted at associate stations. There appears no reason

why this cannot be accomplished to the satisfaction of the shipper, if he will instruct the agent at the central agency of his desires. There was also the matter of obtaining empty cars for loading. The opinion was frequently expressed that without full time agency service at a station there might be discrimination. There is no reason why the agent at the central agency should show preference; as a matter of fact all cars are ordered from one central location and are allocated during car shortages on a formula consisting of several factors. Another principal objection of carload shippers was difficulty in obtaining signature on bills of lading on outbound cars and in many instances it was argued that loading was completed after agency hours, particularly of Commodity Credit corn, which normally constitutes the major portion of shipments. Under the proposed plan the agent from the central agency station will travel to the associate station during regularly assigned hours to sign bill of lading. The Commodity Credit Corporation has said that the commodity can move on the day loaded with signature obtained the following day. The average number of carloads per day at stations involved in program was 1.2 in 1955; 1.3 in both 1956 and 1957. L.c.l. shipments will be delivered to or shipped from the central agency. The record shows an average of one l.c.l. shipment per day per station in 1957. Telegram and express will probably be handled through the central agency, that depending upon the discretion of the companies operating those services. In the past it has been their common practice to use the agency service at an accounting station where we have ordered the discontinuance of an agency and designated an adjacent agency as the accounting and servicing one. We are sure that these latter services will continue to be rendered through the central agency. The estimated average time to perform agency duties at the central agency stations is 3 hours 15 minutes. Under all

these circumstances, little, if any, inconvenience to shippers should prevail at associate stations.

It is the public obligation of this and similar carriers to provide efficient, economical and adequate rail transportation. Agency service is a part of that obligation, insofar as determined needed. There was little, if any, criticism at hearing of the service presently provided. Insofar as agency service is involved it is substantially the same as it was many years ago when a great volume of freight and passenger traffic moved by rail. There is much competition today in both services and this has reduced the needs of such services. They should be fitted to the traffic needs and it is our belief that the proposed reduction and rearrangement of agency service herein proposed accomplishes that end. Stations were originally located to accommodate a slow means of highway transportation, but modern communication and transportation have obviated the need for agencies within only a few miles of each other. In cities of larger size many shippers are required to travel a greater distance than the average of 8.4 miles here involved to obtain such service.

Testimony was offered on the last day of hearing by a railroad witness to the effect that the central agency plan recently inaugurated in South Dakota by the company is operating satisfactorily and without complaint from shippers.

Findings.

We have given serious and thoughtful consideration to all phases of this problem knowing full well that it represents a change of magnitude and that it will have effect on many shippers and users of railroad service. We have also given consideration to the deteriorated financial condition of the railroad. This condition must be recognized. The problem of granting some relief has been before the

National Congress. Savings must be made by reducing or eliminating service no longer needed. The case before us is a proposal to reduce agency service to the level of actual need. It is not one of complete discontinuance. It is the intent, according to evidence, to use the resultant savings for betterments and improvements such as the upgrading of branch lines, purchase of new cars, repair of cars so that they can be furnished to the shipper in better condition for loading and to otherwise better equip the railroad plant so as to insure efficiency, economy and adequate rail transportation.

We have in our consideration given definite attention, not only to the entire broad scope of the program, but have considered the information, testimony, exhibits and facts concerning the needs of each individual station in the entire program. We fully appreciate that each station has conditions and problems and needs which are not similar in all instances to those of other stations. As a consequence certain changes are designated to be made upon the initiation of the program by the railroad. As hereinbefore stated, there may develop other changes found desirable under actual experience and for this purpose, among others, we are retaining jurisdiction.

It is our opinion for all the reasons herein stated, as well as by facts adduced in testimony and exhibits that No. 1 of the prayer in the application of the railroad company should be denied and that Nos. 2 and 3 in said prayer should be granted subject to the conditions, provisions and exceptions set forth in the ordering portion hereof.

Order.

It Is Therefore Ordered that the application of the Chicago and North Western Railway Company be and it is hereby denied as respecting No. One (1) of its prayer and authorized as respecting Nos. Two (2) and

Three (3) of its prayer to inaugurate and establish the central agency plan set forth and described in said application, as more specifically detailed in the following paragraphs:

- (1) Denying the applicant the right to discontinue agency service at all of the stations listed in Appendix "A" attached hereto and made a part hereof and as incorporated at No. One (1) of its prayer.
- (2) Granting authority to the applicant (Nos. Two (2) and Three (3) of its prayer) to forthwith inaugurate and establish a central agency plan wherein one agent will perform the agency service at two or more of the subject stations and that less carload traffic will be handled at a central agency station, within 90 days of the date of this Order as described in petition as amended and as shown in Appendix "C" attached hereto, with central agencies and associate stations as designated thereon, subject to below listed exceptions which have been deleted from said Appendix "C".
- (3) Further Ordering that the railroad company at the end of the 90 day period provided in the preceding paragraph will render a complete and duly verified report to this Commission showing the status of changes authorized herein for our approval, rejection or for the making of such changes therein as at that time may be deemed necessary and proper.
- (4) Further Ordering that when the report in the next preceding paragraph is submitted this Commission will determine whether or not the station buildings (depots) shall be retired or removed and the date therefor.
- (5) Further Ordering that changes can be made by the applicant in the character of service provided at a station, subject to the approval of this Commis-

sion, where need is established for so doing, or that this Commission upon complaint filed by a directly affected party may order a change after due consideration and investigation.

(6) Further Ordering that the Exceptions below listed are a part hereof and that the changes designated shall be placed in effect concurrently with the remainder of the plan.

(7) Further Ordering that jurisdiction of the entire subject matter is retained by this Commission.

Exceptions:

(A) That the proposed combination of Glidden as a central agency and Ralston as an associate station be removed from the program with each station to continue as a separately operated independent agency.

(B) That the proposed combination of Schaller as a central agency and Early as an associate station be removed from the program with each station to continue as a separately operated independent agency.

(C) That the proposed combination of Burt as a central agency and Bancroft as an associate station be removed from the program with each station to continue as a separately operated independent agency.

(D) That the proposed combination of Fenton as a central agency with Lone Rock and Ringsted as associate stations be changed to eliminate Ringsted as an associate station and continue it as a separately operated independent agency.

(E) That the proposed combination of Parkersburg as a central agency with Stout and Dike as associate stations be changed to eliminate Dike as an associate station with it continuing as a separately operated independent agency.

(F) That the proposed combination of Sloan as a central agency with Whiting and Salix as associate stations be changed to eliminate Whiting as an associate station with it continuing as a separately operated independent agency.

(G) That the proposed combination of Dunlap as a central agency with Woodbine and Logan as associate stations be changed to eliminate Logan as an associate station with it continuing as a separately operated independent agency.

(H) That the proposed combination of Harcourt as a central agency with Gowrie and Farnhamville as associate stations be changed to make Gowrie the central agency station with Harcourt and Farnhamville as associate stations.

(I) That the proposed combination of Rolfe as a central agency with Havelock and Bradgate as associate stations be changed to eliminate Havelock as an associate station with it continuing as a separately operated independent agency.

Iowa State Commerce Commission,
R. H. Thompson,

(seal)

Chairman,

John A. Tallman,

Commissioner,

John M. Ropes,

Commissioner.

Attest:

L. F. Wolfinger,

Secretary.

Dated at Des Moines, Iowa, August 11, 1958.

IOWA STATE COMMERCE COMMISSION.

Stations In Program Under Petition As Amended.

Docket No. A-5726.

Appendix "A".

One-Man Stations (105) where Petitioner Seeks Authority to Withdraw the Agents and To Remove the Depot:

Ankeny	Dougherty	Ledyard
Arcadia	Dumont	Linn Grove
Aredale	Dunlap	Logan
Arthur	Early	Lone Rock
Ashton	Ellsworth	Low Moor
Auburn	Fairfax	Manning
Bancroft	Farnhamville.	Mapleton
Battle Creek	Fenton	Maurice
Beaman	Galva	Mechanicsville
Beaver	Garwin	Modale
Blairstown	Gifford	Mondamin
Blencoe	Gladbrook	Montour
Bradgate	Glidden	Moville
Breda	Goldfield	Norway
Buckingham	Gowrie	Odebolt
Calamus	Grand Mound	Ogden
Castana	Granville	Parkersburg
Chelsea	Harlan	Peterson
Clarence	Havelock	Pierson
Clutier	Hospers	Radcliffe
Colo	Hubbard	Ralston
Conrad	Ireton	Randall
Craig	Irvington	Renwick
Cushing	Irwin	Ringsted
Danbury	Joice	River Sioux
Dayton	Kingsley	Rutland
De Witt	Lake Mills	Salix
Dike	Lake View	Searville
Dolliver	Lawn Hill	Scranton

Sheldahl	Stratford	West Side
Sioux Rapids	Sutherland	Wheatland
Sloan	Thor	Whiting
Stanhope	Toledo	Whitten
Stanwood	Traer	Woodbine
Stout	Vail	Woolstock

Stations (27) at which central agency service is proposed as an alternate to closing are as follows:

Ankeny	Fenton	Odebolt
Arcadia	Gifford	Ogden
Aredale	Gladbrook	Parkersburg
Blairstown	Glidden	Radcliffe
Blencoe	Harlan	Renwick
Calamus	Kingsley	Sioux Rapids
Conrad	Lake Mills	Sloan
De Witt	Mapleton	Stratford
Dunlap	Mondamin	Traer

IOWA STATE COMMERCE COMMISSION.**Appropriate Sections Applicable to This Proceeding
Code 1958****Docket No. A-5726****Appendix "B"**

474.10. General Jurisdiction. "The Commission shall have general supervision of all railroads in the State, * * *"

474.14. Changes in Operation and Improvements. "When in the judgment of the Commission (Iowa State Commerce Commission), * * * any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation, or the laws of the State; or when in its judgment * * * or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the * * *, convenience, and accommodation of the public, the Commission may make an Order prescribing such improvements or changes as it finds to be proper * * *."

474.15. Abandoning Station. "It shall be unlawful for any railroad company owning or operating, or which may hereafter own or operate, any railroad in whole or in part in this state, to abandon any station in any city, town or village on its line of railroad, within this state, or to remove the depot therefrom, or to withdraw agency service therefrom, unless it shall first have filed notice of its intention with the Iowa State Commerce Commission and otherwise complied with the provisions of this section and sections 474.16 and 474.17. Upon the filing of such notice the Commission shall designate the place or places within such town or village where notice shall be posted and the

railroad company shall thereupon, at its own expense, cause to be posted at the place or places so designated, fifteen days notice of intention to abandon or discontinue such station or agency, or remove such depot, and shall file proof of such posting with the commission. The notice shall be in such form as prescribed by the commission."

474.16. Objections—Hearing. "Any person or persons directly affected by the proposed abandonment or discontinuance of any station or agency, or removal of any depot, may file written objections thereto with the Iowa State Commerce Commission, stating the grounds for such objections, within fifteen days from the time of the posting of the notice as provided in Section 474.15.. Upon the filing of such objections the Commission shall fix the time and place for hearing thereon, which hearing shall be held within sixty days from the filing of such objections. Written notice of the time and place of such hearing shall be mailed by the Commission to the railroad company and the person or persons filing objections at least ten days prior to the date fixed for such hearing."

474.17. Order of Commission. "Upon said hearing the Iowa State Commerce Commission may prohibit the abandonment or discontinuance of such station or agency, or the removal of the depot, or may make such other order as is warranted by the evidence produced at such hearing. But if no objections are filed as hereinbefore provided, the Commission shall make an order permitting the railroad company to proceed with such abandonment or discontinuance, or removal of the depot."

IOWA STATE COMMERCE COMMISSION.

Stations in Program as Per Decision and Order

Docket No. A-5726

Appendix "C"

Associate Stations

Arthur
Ashton
Auburn
Battle Creek
Beaman
Beaver
Bradgate
Breda
Buckingham
Castana
Chelsea
Clarence
Clutier
Colo
Craig
Cushing
Danbury
Dayton
Dolliver
Dougherty
Dumont
Ellsworth
Fairfax
Farnhamville
Galva
Garwin
Goldfield
Grand Mound
Granville
Harcourt
Hospers
Hubbard
Ireton

Irvington
Irwin
Joice
Lake View
Lawn Hill
Ledyard
Linn Grove
Lone Rock
Low Moor
Manning
Maurice
Mechanicsville
Modale
Montour
Moville
Norway
Peterson
Pierson
Randall
River Sioux
Rutland
Salix
Scarville
Scranton
Sheldahl
Stanhope
Stanwood
Stout
Sutherland
Thor
Toledo
Vail
West Side

Central Agency Stations

Wheatland
Whitten
Woodbine
Woolstock
Ankeny
Arcadia
Aredale
Blairstown
Blencoe
Calamus
Conrad
De Witt
Dunlap
Fenton
Gifford
Gladbrook
Gowrie
Harlan
Kingsley
Lake Mills
Mapleton
Mondamin
Odebolt
Ogden
Parkersburg
Radcliffe
Renwick
Sioux Rapids
Sloan
Stratford
Traer

The central agency plan approved in Decision and Order results in the following combination of stations:

Stations in Each Area Involved in the Central Agency Program and Area Headquarters Station

- *Clinton, Low Moor—Clinton
- De Witt, Grand Mound—De Witt
- Calamus, Wheatland—Calamus
- *Lowden, Clarence—Lowden
- *Tipton, Stanwood—Tipton
- *Mt. Vernon, Mechanicsville—Mt. Vernon
- Blairstown, Norway, Fairfax—Blairstown
- *Tama, Toledo, Montour—Tama
- Traer, Clutier, Buckingham—Traer
- Parkersburg, Stout—Parkersburg
- Aredale, Dougherty, Dumont—Aredale
- *Hanlontown, Joice—Hanlontown
- Lake Mills, Scarville—Lake Mills
- *Belle Plaine, Chelsea—Belle Plaine
- *State Center, Colo—State Center
- *Story City, Randall—Story City
- Ankeny, Sheldahl—Ankeny
- Conrad, Whitten, Beaman—Conrad
- Gladbrook, Garwin—Gladbrook
- Gifford, Lawn Hill—Gifford
- Radcliffe, Ellsworth, Hubbard—Radcliffe
- Gowrie, Harcourt, Farnhamville—Gowrie
- *Lake City, Auburn—Lake City
- Stratford, Dayton, Stanhope—Stratford
- *Carroll, Breda—Carroll
- *Eagle Grove, Woolstock, Thor—Eagle Grove
- *Dakota City, Rutland—Dakota City
- Renwick, Goldfield—Renwick
- *Algona, Irvington—Algona
- *Elmore, Minn., Ledyard, Iowa—Elmore, Minn.
- Fenton, Lone Rock—Fenton
- *Ceylon, Minn., Dolliver, Iowa—Ceylon, Minn.
- *Rolfe, Bradgate—Rolfe
- Sioux Rapids, Linn Grove, Peterson—Sioux Rapids
- *Orange City, Maurice—Orange City
- *Paullina, Granville, Sutherland—Paullina

- Hawarden, Ireton, Craig—Hawarden
- Sloan, Salix—Sloan
- Ogden, Beaver—Ogden
- Jefferson, Scranton—Jefferson
- Arcadia, West Side, Vail—Arcadia
- Dunlap, Woodbine—Dunlap
- Harlan, Irwin, Manning—Harlan
- Odebolt, Arthur—Odebolt
- Ida Grove, Battle Creek—Ida Grove
- Mapleton, Castana, Danbury—Mapleton
- Sac City, Lake View—Sac City
- Holstein, Galva, Cushing—Holstein
- Kingsley, Moville, Pierson—Kingsley
- Mondamin, Modale—Mondamin
- Blencoe, River Sioux—Blencoe
- Sibley, Ashton—Sibley
- Sheldon, Hospers—Sheldon

* Stations not in program.

PLAINTIFF'S EXHIBIT NO. 11.

NATIONAL RAILROAD ADJUSTMENT BOARD.

Third Division.

Chicago and North Western
Railway Company, }
vs.
Order of Railroad Telegraphers. }

CARRIER'S EX PARTE SUBMISSION.

Statement of Claim:

That the notices served by the Order of Railroad Telegraphers on the carrier, dated December 19, 1957 and December 23, 1957 are in contravention of Article VI of the Agreement of November 1, 1956.

Carrier's Statement of Facts:

Effective November 1, 1956, this carrier and a number of other carriers, entered into an agreement through their authorized representatives, with The Order of Railroad Telegraphers and certain other railroad labor organizations, a copy of which is attached hereto as Exhibit "A". Article VI of that agreement provides as follows:

Article VI--Duration of Agreement:

The purpose of this agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending notice to—

(a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement.

(b) Increase or decrease the rate of compensation provided in existing agreements or under-

standings, or eliminate or establish agreements providing the rate of compensation, covering overtime payments, arbitrary payments, Sunday or holiday payments, time paid for but not worked, or increase or decrease the number of paid holiday or paid vacation days.

(c) Increase or decrease the amount of payments required to be made by the Agreement of December 21, 1955, and Article V of this Agreement for hospital, medical and surgical benefits for the employees and their dependents.

(d) This Article VI does not prevent adjustments under normal processes on the individual carriers in the rates of pay of individual positions; correction of inequities as between rates for different individual positions on a particular railroad; or negotiation of rates for new positions or positions where the duties or responsibilities have been or are changed. This Article VI will not debar management and committees on individual railroads from agreeing upon any subject of mutual interest.

(e) This Article VI does not prevent the progressing of pending notices, and the serving of notices and the negotiations of agreements dealing with stabilization of employment, separation allowances or other matters not prohibited by the foregoing provisions of this Article VI.

On December 19, 1957 and December 23, 1957 The Order of Railroad Telegraphers served notices on the carrier, copies of which are attached hereto as Exhibits "B" and "B-1". Conferences were held with respect to such notices between the chief operating officer of the carrier designated to handle such matters and the representatives of The Order of Railroad Telegraphers on January 17, 1958, at which time the carrier advised the organization that their purported notice did not cover a matter which was a proper subject for a Section 6 notice under the Railway Labor Act. The representatives of The Order of Rail-

road Telegraphers, however, have asserted the contrary. The parties have been unable to adjust the dispute as to whether or not the notices in question cover matters on which the carrier is required to bargain with the organization under the Railway Labor Act, nor whether bargaining at this time is barred by the provisions of Article VI of the November 1, 1956, Agreement. Consequently, this submission is made to the Third Division, National Railroad Adjustment Board for the purpose of securing an award sustaining the carrier's position.

Position of Carrier: As stated, it is the position of the carrier that the notices served by The Order of Railroad Telegraphers on December 19, 1957 and December 23, 1957 are in contravention of Article VI of the November 1, 1956 Agreement. In the succeeding discussion the application of that Article to the notice served by The Order of Railroad Telegraphers will be considered in detail. First, however, certain general characteristics of the moratorium contained in Article VI should be considered.

Article VI of the November 1, 1956, agreement provides that no carrier or organization, party to the agreement, will serve any notice or progress any pending notice designed to accomplish the results described in paragraphs (a), (b) and (c). Paragraphs (d) and (e), however, provide that certain specified matters may be made the subject of notice, negotiation and agreement during the life of the agreement. Apparently, it is the organization's position that the proposals which it served on December 19, 1957 and December 23, 1957 are proper under the provisions of paragraph (e) of the moratorium. As the succeeding discussion will show, however, the proposal in question is inconsistent with the prohibitions contained in paragraph (b) since it would inevitably result in payments for time not worked. If proposals of this kind are

not prohibited by the moratorium it would appear that the specific prohibitions of paragraph (b) will be largely defeated. It would seem indisputable, therefore, that Article VI should be construed in such a manner as to give effect to all of its provisions, and, in accordance with generally accepted rules of construction, that result is the proper one.

To reach this result, the starting point must be the assumption that the parties meant what they said when they agreed in paragraph (b) that they would not serve or progress notices which would change existing rates, or establish rates for time paid for but not worked. The same assumption must be made, of course, with respect to paragraph (e), which permits the progression of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment, and other matters. It must also be assumed, however, that the provisions of paragraph (e) were not intended to emasculate the other portions of the moratorium.

Once these assumptions are made, it is possible to define the areas of prohibited activity under the first three paragraphs of Article VI and the areas of permissible activity under the last two paragraphs of that article, in such a manner as to give appropriate effect to all of the provisions of Article VI, and the general purpose of the agreement.

Paragraph (d) of the moratorium permits adjustment in the rates of pay established by Articles I, II, III and IV of the agreement under certain circumstances. The same is true of separation allowances referred to in paragraph (e). Proposals which may properly be classified as dealing with such matters are permissible. However, that part of paragraph (e) relating to stabilization of employment, as interpreted by the organization, would

appear to render the prior provisions of the agreement virtually meaningless, unless qualified by the specific prohibitions of paragraph (b). It is necessary, therefore, to harmonize the right to progress proposals dealing with the stabilization of employment with the other provisions of Article VI in order to give effect to all of the provisions of that Article. To achieve this accommodation, Article VI must be construed to mean that proposals may not be served or progressed under the claim that they deal with stabilization of employment if they would necessarily produce results prohibited by paragraphs (a), (b) or (c) of the moratorium. On the other hand, proposals reasonably related to stabilization of employment which may be effectuated without necessarily coming into conflict with paragraphs (a), (b) and (c) may be served and progressed under paragraph (e). Thus, a proposal which could not be adopted without resulting in an increase in time paid for but not worked would be barred, even though it might result in stabilization of employment.

Essentially, this approach involves an analysis of any proposal claimed to deal with stabilization of employment, in terms of its likely results if adopted. If the probable results would be contrary to the provisions of the first three paragraphs of the moratorium, the proposal is barred. Otherwise, the proposal may be progressed as provided in paragraph (e).

This construction of Article VI is consistent with generally accepted standards for contract interpretation. The relevant principle is stated in *3 Williston on Contracts* 1779, as follows:

"The writing will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose."

The principle that the general purpose of the agreement controls the construction of its parts is stated as follows by Professor Williston:

"The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless and inexplicable; and if this is impossible an interpretation which gives effect to the main apparent purpose of the contract will be favored." (3 *Williston on Contracts* 1781-82.)

These principles are, of course, applicable to railroad labor agreements such as that involved in this dispute. Such agreements "must always be considered as a whole. Each section must be considered in relation to all other sections" First Division Award No. 13250, Referee O'Malley.

In a memorandum attached to Award No. 5080 of the First Division, Justice Royal A. Stone of the Supreme Court of Minnesota also said such agreements

" . . . must be considered as a whole, each part interpreted in whatever light may be shed on it by any or all others . . . and applied by the same standards of decision as other written contracts. If such agreements are not to be so interpreted and applied, they are not contracts."

In First Division Award No. 15042, Referee Robert O. Boyd said:

"Single provisions of an agreement should not be considered separately, but each provision of an agreement must be applied in reference to all other provisions in order to give effect to each in accordance with the intent of the parties"

"In interpreting an agreement special attention should be given to the expressed intent of the parties when the agreement was formed."

In First Division Award No. 16781, Referee Charles Loring, formerly Chief Justice of the Supreme Court of Minnesota, said:

"On account of the apparent conflict between the last paragraph of Section (c) and first paragraph thereof, the above section must be construed as a whole, each part in the light of the rest and so far as reasonable giving effect to all provisions. If the last paragraph of sub-division (c) be given the effect contended for by the claimant, it is then in conflict with the preceding paragraphs thereof. * * * So applied, we use the rule of interpretation well established by the courts and by this division. Reasonably construed together, the first paragraph of (c) applies to the facts now before us and the last does not."

This accommodation of that part of paragraph (e) referring to proposals and agreements dealing with stabilization of employment to the specific prohibitions of paragraph (b) may be accomplished also by a proper definition of stabilization of employment.

Stabilization of employment, in its accepted meaning and as used in the agreement, means that available work will be evenly distributed throughout the year to the extent possible so that employes necessary to meet this work load will have stable employment. In other words, employment will be stabilized to the extent that employment opportunities can be stabilized. To the extent that work cannot be handled in this manner, i.e., cannot be stabilized, stabilization of employment does not mean that employes must be kept on when there is nothing for them to do. A proposal properly related to stabilization of employment, therefore, must have as its primary objective the elimination of avoidable fluctuations in work opportunities, and must not be primarily designed to provide payments for time not worked.

This definition of stabilization of employment is con-

sistent with its commonly accepted meaning. In *Labor Dictionary* by P. H. Casselman, Professor of Industrial Relations at the University of Ottawa, employment stabilization is defined as follows:

"The principle and practice of reducing fluctuations in employment in an enterprise, industry or area. The following are some of the policies that have been suggested to stabilize employment on the employer level: 1) increase sales in slack periods, 2) develop new uses for old products which would follow a different seasonal pattern, 3) diversify output or go into a different line of business in which peak activity would coincide with the seasonal slack in the old line, 4) produce for stock during slack seasons, 5) bring out new models in the market during normal dull seasons and 6) lower prices in dull seasons to stimulate sales."

Much this same meaning is given to "stabilization of employment" by the National Industrial Conference Board. In No. 27 of its publications entitled *Studies in Personnel Policy*, the subject of Reducing Fluctuations in Employment was discussed. Under the heading "General Aspects of Employment Stabilization Program," the following discussion appears:

"A successful employment stabilization program requires close cooperation between the production and sales divisions, the higher executive groups, the personnel departments and the entire supervisory force to deal effectively with both internal and external factors causing employment irregularities. The various measures for stabilizing employment may then be roughly classified into policies of (1) production, (2) distribution, and (3) personnel." (p. 8.)

Under the heading "Measures for Stabilizing Employment" the following summary statement is made:

"The principal methods used by the 203 reporting companies have been tabulated on an industry basis and further subdivided by capital and consumer goods in Table 2.

"Manufacture for stock, either of completed units, sub-assemblies or parts, the training and transfer of workers and the use of the flexible work week are the methods most frequently employed to achieve employment regularity in the companies studied. Other measures utilized by considerable groups of companies are: introduction of new products or models, creation of consumer demand by special advertising campaigns and inducements to place orders in off-seasons."

This study, therefore, clearly shows that stabilization of employment is generally understood to refer to efforts to distribute the work load as evenly as possible throughout the year in order to provide regular employment. The phrase is not used in connection with programs which guarantee compensation when there is no work to perform. Thus, the NICB study referred to is divided into three parts. Part One is entitled "General Aspects of Employment Stabilization Programs", Part Two is headed "Case Studies in Employment Stabilization," while Part Three is entitled "Income-and-Employment-Security Programs." This treatment shows that Stabilization of Employment programs are quite distinct from Employment or Income Security programs.

Paragraph (e) of Article VI also supports this definition of stabilization of employment. (That paragraph includes stabilization of employment and separation allowances as matters which may be dealt with where they do not produce results prohibited by paragraphs (a), (b) and (c) of the moratorium.) This shows that the parties did not regard the subject of separation allowances as one which could be pursued under the category of proposals dealing with stabilization of employment. In other words, stabilization of employment was not intended to be comprehensive enough to include separation allowances.

Separation allowances, of course, constitute a form of continued compensation for employes whose services are

no longer needed. Such allowances are normally paid to employes whose services are terminated because of technological improvements, changes in work methods or other comparable developments. In effect such allowances constitute a form of income security or pay for time not worked. Thus, the fact that stabilization of employment was used in a sense which made it necessary to provide separately for separation allowances demonstrates that stabilization of employment was not intended to comprehend proposals related in purpose and effect to separation allowances. Proposals primarily designed to require pay for time not worked, therefore, would be improper "stabilization of employment" proposals.

Thus, the restriction of proposals and agreements dealing with stabilization of employment to those which do not normally result in pay for time not worked is consistent with the standards of construction referred to above and also with the meaning normally attributed to that phrase.

Another closely related general principle which is essential to any determination as to whether or not a particular proposal is barred by the moratorium is that substance and probable effect, not form, are the controlling factors. It may be argued, for example, that a proposal which contemplates that employes of the carrier shall be used to build all diesel locomotives or other items of equipment does not come within the bar of the moratorium. If it is a fact, however, that patent restrictions or the economic impracticability of following such a course would require continued purchase of such equipment from other manufacturers, the rule in question would require substantial payments for time not worked. In substance, it would be similar to a rule which expressly required the carrier to pay its employes an amount equivalent to what they would have earned if they had been used in place of the manufacturer's employes when diesels are purchased

from manufacturers. A proposal so phrased would obviously be barred by paragraph (b)'s provisions regarding time paid for but not worked. The fact that the proposal actually served, regardless of its form, would produce this same result makes it subject to the moratorium provisions of Article VI. The moratorium would be of little effect if what it prohibits could be accomplished by merely changing the form in which proposals are made in order to conceal their inevitable effect.

This interpretation of the moratorium is supported by the awards of Special Board of Adjustment No. 215, Honorable Nathan Cayton, Chairman, in Case No. 1 and Case No. 10, attached hereto as Exhibits C and D. Award No. 1 is particularly relevant since it concerns a proposal providing for "A stabilized season of employment" for the employes involved. Judge Cayton held that this proposal was barred by the moratorium since it would, in effect place "upon the Carriers a potential liability for time not worked * * *" In other words, Judge Cayton clearly recognized that the substance and effect, rather than the form, of the proposals should determine their status under the moratorium and that stabilization of employment does not include proposals which might require pay for time not worked.

These principles, applied to the proposal in question, compel the conclusion that the notice served by the organization is barred by the moratorium.

As stated, the notice served by the Order of Railroad Telegraphers would require prior approval by the organization before any positions in existence on December 3, 1957, could be abolished or discontinued. There is no mystery, of course, regarding the purpose of this proposal. It is designed to require the carrier to maintain positions for which there is no need and thus to require payment for time not worked.

During the past few years, this Carrier has undertaken to reduce its station forces to levels consistent with the volume of work to be performed by the employes in question. This process has resulted in some instances in the abolition or discontinuance of positions held by employes represented by the organization. Thus, since December 3, 1957, such positions have been abolished, as shown by Exhibit E hereto. These positions have been abolished because of the indisputable fact that the employes holding such positions had very little, if any, work to perform. The majority of all such abolished positions, particularly the agent positions, were abolished only after extensive hearings before state regulatory agencies in which the Order of Railroad Telegraphers participated fully, and the positions were abolished only after receipt of specific instructions so to do from the state regulatory commissions involved, pursuant to findings that the services of full time agents were not required to meet the transportation needs of the public. Obviously, the proposed rule is designed to give the organization the right to nullify this action and to require the re-establishment of the positions involved, thus resulting in substantial payments for time not worked.

The carrier has also obtained authority from and been directed by the South Dakota and Iowa State Commissions to place a central agency plan in effect for certain areas in those states. This authority was granted by the Commissions, over the objections of the Order of Railroad Telegraphers, on the basis of its conclusion that an agent at all of the stations involved is not necessary to adequately and efficiently serve the public, and that the maintenance of agency service in excess of that necessary would materially decrease the ability of the petitioner to efficiently serve the public. The proposed rule is obviously intended to permit it to over-ride the action of the state authorities

and to require the carrier to maintain positions which are not needed.

It is apparent, therefore, that one of the purposes of the proposed rule is to require the carrier to re-establish the positions which have been abolished since December 3, 1957 and to re-establish and maintain those which were subject to the orders of the Iowa and South Dakota Commissions. It is equally clear that the employes holding such positions would have little, if any, work to perform and would thus be paid for time not worked. The proposed rule, therefore, is barred by the provisions of Article VI of the November 1, 1956 Agreement.

It may be argued, of course, that the proposed rule does not require the re-establishment of such positions and does not prohibit the abolishment of positions but merely requires prior approval by the organization. It would be extremely naive, however, to assume that the organization wishes to have a veto power over the abolishment of positions in existence as of December 3, 1957, merely for the purpose of approving the action taken by the carrier, as described above. In fact, representatives of the organization have made it abundantly clear that their purpose is to require the re-establishment of positions abolished since December 3, 1957, and to prohibit any future discontinuance of positions now in existence, regardless of service requirements. This is evident from the fact that in practically all instances referred to above, the organization has opposed, in every possible way, the carrier's efforts to revise its station forces to fit actual transportation service requirements. It must be assumed, therefore, that the organization would exercise the veto power inherent in the proposed rule in accordance with its previously manifested attitude regarding the abolishment of positions. It is submitted, therefore, that the proposed rule would inevitably require substantial payments for time not worked.

The rule in question would also require payments for time not worked when positions are abolished or discontinued because of emergency conditions.

As a result of the recommendations of Emergency Board No. 106, the August 21, 1954 agreement between the carriers and the organizations which appeared before that Board, including the O.R.T., undertook to deal with the matter of notice when forces were reduced because of emergency conditions. Article VI of that Agreement, which is in effect on this Carrier, provided as follows:

"Rules, agreements or practices, however established, that require more than sixteen hours' advance notice before abolishing positions or making force reductions are hereby modified so as not to require more than sixteen hours such advance notice under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the carrier's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employes involved in the force reductions no longer exists or cannot be performed."

The proposed rule does not except employes affected by force reductions in emergency conditions such as those described in the August 21, 1954 agreement. It must be assumed, therefore, that the requirement of prior agreement with the organization is to supersede the 16-hour rule. This would mean that the carrier, suddenly confronted with an emergency which necessitates suspension of its operations, would be compelled to negotiate an agreement with the organization before positions held by employes represented by the organization could be abolished or discontinued. Such procedure would inevitably require more time than the 16-hour period provided by the present rule. In the meantime, it would be necessary

to continue to pay the employes involved regardless of whether there is any work for them to perform. The proposed rule would thus produce substantial payments for time not worked when positions must be abolished or discontinued because of emergency conditions.

Conclusion.

The foregoing discussion demonstrates that the notice served by The Order of Railroad Telegraphers on December 19 and December 23, 1957, would require substantial payments for time not worked. As such, it is not reasonably related to stabilization of employment as that phrase is used in Article VI of the Agreement of November 1, 1956 and is barred by the moratorium provisions of said article.

While subsequent to the execution of the agreement of November 1, 1956 a subsequent agreement or understanding was reached between the parties to such agreement that disputes arising thereunder would be submitted to a Committee established to hear and decide such disputes, in view of the fact that an attempt has been made by another carrier to submit an identical dispute to the Committee so established and the Committee refused to consider the dispute, no useful purpose could or would be served by attempting to submit the same controversy again to this committee.

The carrier respectfully requests that this Division render an award sustaining the position of the carrier in this dispute that the notices served by The Order of Railroad Telegraphers, Exhibits "B" and "B-1" hereto, were and are in contravention of Article VI of the November 1, 1956 Agreement, Exhibit "A" hereto.

All information contained herein has previously been submitted to the employes and is hereby made a part of the particular question here in dispute.

FOR THE CHICAGO AND NORTH
WESTERN RAILWAY COMPANY:

T. M. VAN PATTEN,
Director of Personnel.

Chicago, Illinois, August 22, 1958.

NON-OPS
NOVEMBER 1, 1956

AGREEMENT DATED NOVEMBER 1, 1956

BETWEEN RAILROADS REPRESENTED BY THE

EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES

AND THE EMPLOYEES OF SUCH RAILROADS REPRESENTED BY THE

EMPLOYEES' NATIONAL CONFERENCE COMMITTEE,

ELEVEN COOPERATING RAILWAY LABOR ORGANIZATIONS

Cassier Exhibit "A"

MEDIATION AGREEMENT

This agreement made this 4th day of November, 1956, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and hereby made a part hereof, and represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the employees shown thereon and represented by the Railway Labor Organizations signatory hereto, through the Employes' National Conference Committee; Eleven Cooperating Railway Labor Organizations, witnesseth:

IT IS AGREED:ARTICLE I - INITIAL WAGE INCREASE

Effective November 1, 1956, all hourly, daily, weekly, monthly and piece-work rates of pay for employees covered by this agreement will be increased in the amount of 10 cents per hour applied so as to give effect to this increase in pay irrespective of the method of payment. The increase provided for in this Article I shall be applied as follows:

(a) Hourly Rates -

Add 10 cents to the existing hourly rates of pay.

(b) Daily Rates -

Determine the equivalent hourly rate by dividing the existing daily rate by the number of hours comprehended by the daily rate. 10 cents per hour multiplied by the number of hours comprehended by the daily rate shall be added to the existing daily rate.

(c) Weekly Rates -

Determine the equivalent hourly rate by dividing the existing weekly rate by the number of hours comprehended by the weekly rate. 10 cents per hour multiplied by the number of hours comprehended by the weekly rate shall be added to the existing weekly rate.

(d) Monthly Rates -

Determine the equivalent hourly rate by dividing the existing monthly rate by the number of hours comprehended by the monthly rate. 10 cents per hour multiplied by the number of hours comprehended by the monthly rate shall be added to the existing monthly rate.

(e) Piece Work -

Adjustment of piece-work rates of pay shall be based on the amount of increase applicable to the basic hourly rate for the class of work performed. Where piece-work rates of pay are in effect on carriers having special rules as to the application of any increase, or decrease, in such rates, such rules shall apply. In the absence of any definite rule governing, the equivalent of 10 cents per hour shall be added to the unit piece-work price.

(f) Red Caps -

Rates of pay, or guarantees, for Red Caps will be increased by 10 cents per hour. This amount will be multiplied by the number of hours paid for, and this sum will be added to the earnings of Red Caps regardless of the method of determining their earnings.

(g) Minimum Daily Increases -

The increases in rates of pay described in paragraphs (a) to (f), inclusive, shall be not less than eight times the applicable increases per hour for each full time day of eight hours, required to be paid for by the rules agreement. In instances where under existing rules agreement an employee is worked less than eight hours per day, the increase will be determined by the number of hours required to be paid for by the rules agreement.

(h) Deductions -

In so far as concerns deductions, which may be made from the rates resulting from the increase herein granted, under Section 3(m) of the Fair Labor Standards Act of 1938, they may continue to be made to the extent that such deductions were being legally made as of August 31, 1941.

(i) Application of Wage Increase -

The increase in wages provided for in this Article I shall be computed in accordance with the wage or working conditions agreement in effect between each carrier and each labor organization of employees, and in instances where fixed daily, weekly, or monthly rates are paid for all services rendered, the increase in wages shall be applied in such manner as will give effect to the number of hours used in fixing said rates and to the equivalent hours for special allowances included in said rates. Special allowances not included in said rates will not be increased.

(j) Coverage -

All employees who were on the payroll of the carrier on November 1, 1956, or who were hired subsequent thereto, regardless of whether they are now in the employ of the carrier, shall receive the amounts to which they are entitled under this Agreement. Overtime hours will be computed in accordance with the individual schedules for all overtime hours paid for.

ARTICLE II - SECOND-YEAR INCREASE

Effective November 1, 1957, all hourly, daily, weekly, monthly and piece-work rates of pay for employees covered by this Agreement will be increased in the amount of 7 cents per hour, applied so as to give effect to this increase in pay irrespective of the method of payment. The increase provided for in this Article II shall be applied in the same manner as provided for in Article I.

ARTICLE III - THIRD-YEAR INCREASE

Effective November 1, 1958, all hourly, daily, weekly, monthly and piece-work rates of pay for employees covered by this agreement will be increased in the amount of 7 cents per hour, applied so as to give effect to this increase in pay irrespective of the method of payment. The increase provided for in this Article III shall be applied in the same manner as provided for in Article I.

ARTICLE IV - COST-OF-LIVING ADJUSTMENT

(a) Wage rates resulting from the increases provided for in Articles I, II and III of this Agreement, without taking into consideration cost-of-living adjustments, will not be reduced under this Article IV. However, such wage rates are subject to a cost-of-living adjustment to be made on the dates provided in paragraph (b) whereby the adjusted rate as of May 1 and November 1 each year will exceed the rates resulting from the increase provided for in Articles I, II and III by 1c per hour for each five-tenths of a point by which the index specified in paragraph (b) as of March 15 and September 15, respectively, each succeeding year exceeds the index of 117.1 for September 15, 1956. The initial allowance of 1c per hour made when the index reaches 117.6 will not be eliminated unless the index reaches the 117.1 level or less.

(b) The cost-of-living adjustment will be determined in accordance with changes in the "Consumers' Price Index for Moderate Income Families for Large Cities Combined" - "All Items" (1947-1949 = 100) - as published by the Bureau of Labor Statistics, U. S. Department of Labor, and hereafter referred to as the BLS Consumers' Price Index. The cost-of-living adjustment shall be made commencing May 1, 1957, and each sixth month thereafter based on the BLS Consumers' Price Index as of March 15, 1957, and the BLS Consumers' Price Index each sixth month thereafter as illustrated by the following table:

<u>BLS Consumers' Price Index as of:</u>	<u>Effective Date of Adjustment - first pay period on or after:</u>
March 15, 1957	May 1, 1957
September 15, 1957	November 1, 1957
March 15, 1958	May 1, 1958
September 15, 1958	November 1, 1958
March 15, 1959	May 1, 1959
September 15, 1959	November 1, 1959

The cost-of-living adjustment, when provided for, shall remain in effect to date of subsequent adjustment. The cost-of-living adjustment will be applied as a wage increase or a wage reduction in the same manner as the wage increase provided for in Articles I, II and III hereof.

(c) The adjustments are to be made on the dates as illustrated in paragraph (b) of this Article in the amounts illustrated in the following examples:

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<u>MLS Consumers' Price Index</u>	<u>Cost-of-Living Allowance</u>
117.1 and less than 117.6	None
117.6 and less than 118.1	1 cent per hour
118.1 and less than 118.6	2 cents per hour
118.6 and less than 119.1	3 cents per hour
119.1 and less than 119.6	4 cents per hour

and so forth, with corresponding 1 cent per hour adjustment for each .5 point change in the index.

(d) In the event the Bureau of Labor Statistics does not issue the specified MLS Consumers' Price Index on or before the effective dates specified in paragraph (b), the cost-of-living adjustment will become effective on the first day of the pay period during which the index is released.

(e) No adjustments, except as provided in paragraph (f), shall be made because of any revision which may later be made in the published figures of the MLS Consumers' Price Index for any base month.

(f) The parties to this Agreement agree that the continuance of the cost-of-living adjustment is dependent upon the availability of the official monthly MLS Consumers' Price Index in its present form and calculated on the same basis as the Index for September 15, 1956, except that, if the Bureau of Labor Statistics, U. S. Department of Labor, should during the effective period of this Agreement revise or change the methods or basic data used in calculating the MLS Consumers' Price Index in such a way as to affect the direct comparability of such revised or changed index with the index for September 15, 1956, then that Bureau shall be requested to furnish a conversion factor designed to adjust to the new basis the base index for September 15, 1956, described in paragraph (b) hereof.

ARTICLE V - HEALTH AND WELFARE

(a) In addition to the wage adjustments provided for in Articles I, II, III and IV of this Agreement, each carrier party to this agreement will pay to The Travelers Insurance Company for each month after October, 1956, the following:

(1) The carriers parties to this Agreement who are parties to The Travelers Insurance Company Group Policy Contract No. GA-23000 will pay \$10.9395 (\$11.05 less one per cent for railroad costs) per month for each employee who is a "Qualifying Employee" as defined in the Group Policy Contract and who shall have rendered compensated service to the carrier in such month. The payments required by this paragraph of such carriers shall be in lieu of the payments required under paragraph 2(a) of the Health and Welfare Agreement between the parties hereto made at Chicago, Illinois on December 21, 1955.

(2) All carriers parties to this Agreement and not parties to The Travelers Insurance Company Group Policy Contract No. GA-23000 will pay \$4.2075. (\$4.25 less one per cent

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for railroad costs) per month for each of its employees represented by any of the organizations signatory hereto who would be a "Qualifying Employee" as defined in The Travelers Insurance Company Group Policy Contract No. GA-23000 if the carrier were a party to such Group Policy Contract, and who renders any compensated service to the carrier in such month. The payments required by this paragraph of such carriers shall be in addition to the payments required under paragraph 2(b) of the Health and Welfare Agreement between the parties hereto made at Chicago, Illinois, on December 21, 1955.

NOTE: In the application of paragraphs (1) and (2) above, carriers who are parties to The Travelers Insurance Company Group Policy Contract No. GA-23000 with respect to some, but not all their employees represented by organizations signatory hereto, shall be governed by paragraph (1) as to employees covered by such Group Policy Contract and by paragraph (2) as to employees not covered by such Group Policy Contract.

(b) The parties hereto will secure expansion of the terms of The Travelers Insurance Company Group Policy Contract No. GA-23000 so as to provide, effective December 1, 1956, to dependents (as defined in The Travelers Insurance Company Group Policy No. GA-23111) of all employees for whom payments are required to be made under paragraph (1) or (2) of Section (a) of this Article, as nearly as practicable, the same Hospital, Medical and Surgical benefits now provided to "Qualifying Employees" under said Group Policy Contract No. GA-23000 in so far as the funds available will permit consistent with a reasonable margin of safety.

ARTICLE VI - DURATION OF AGREEMENT

The purpose of this Agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending notice to -

- (a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement.
- (b) Increase or decrease the rate of compensation provided in existing agreements or understandings, or eliminate or establish agreements providing the rate of compensation, covering overtime payments, arbitrary payments, Sunday or holiday payments, time paid for but not worked, or increase or decrease the number of paid holiday or paid vacation days.

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- (c) Increase or decrease the amount of payments required to be made by the Agreement of December 21, 1955, and Article V of this Agreement for hospital, medical and surgical benefits for the employees and their dependents.
- (d) This Article VI does not prevent adjustments under normal processes on the individual carriers in the rates of pay of individual positions; correction of inequities as between rates for different individual positions on a particular railroad; or negotiation of rates for new positions or positions where the duties or responsibilities have been or are changed. This Article VI will not debar management and committees on individual railroads from agreeing upon any subject of mutual interest.
- (e) This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment, separation allowances or other matter not prohibited by the foregoing provisions of this Article VI.

ARTICLE VII - APPROVAL

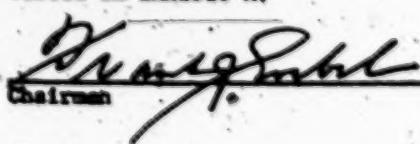
This Agreement is subject to approval of the courts with respect to carriers in the hands of receivers or trustees.

ARTICLE VIII - EFFECT OF THIS AGREEMENT

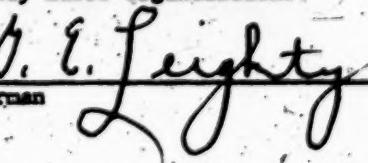
This Agreement is in settlement of the dispute growing out of notices served on the carriers listed in Exhibits A, B and C on or about June 20, 1956, and to proposals served by the individual railroads on organization representatives of the employees involved on or about the same date, and shall be construed as a separate agreement by and on behalf of each of said carriers and its employees represented by each of the organizations signatory hereto, and shall remain in effect until October 31, 1959 and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended, except that notices may be served before the expiration of the three-year period, provided such notices do not contemplate effective dates earlier than November 1, 1959.

SIGNED AT CHICAGO, ILLINOIS THIS 1ST DAY OF NOVEMBER, 1956.

For the participating carriers
listed in Exhibit A:


Chairman

Employees' National Conference
Committee, Eleven Cooperating
Railway Labor Organizations:


Chairman

L. P. F.
E. P. Hargrove
J. E. Jones
G. W. Knight
R. W. Pickard
G. C. White

For the participating carriers
listed in Exhibit B:

L. P. Loomis
Chairman

K. Wolfe

C. W. McCoy

S. T. Comer

E. J. Casner

F. H. Fallman

E. S. Kershaw

G. M. Goss

Railway Employes' Department, A.F. of L.

Michael Fox
President

International Association of Machinists
Earl Melton
General Vice President

International Brotherhood of Boiler-
makers, Iron Ship Builders, Blacksmiths,
Forgers and Helpers

W. A. Calum
International President

Blacksmiths - Railroad Division

Edward H. Wolfe
Vice President - (Blacksmiths)

Sheet Metal Workers' International
Association

C. D. Bruns
General Vice President

International Brotherhood of Electrical
Workers

J. Duffy
International Vice President

Brotherhood Railway Carmen of America

G. Benhardt
General President

International Brotherhood of Firemen,
Oilers, Helpers, Roundhouse and Railway
Shop Laborers

A. P. Moty
President

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For the participating carriers
listed in Exhibit C:

James R. Cawieker

Chairman

W. S. Baker

B. B. Bryant

J. K. Dugay Jr.

H. D. Scholl

L. B. Tolleson

Brotherhood of Railway and Steamship
Clerks, Freight Handlers, Express and
Station Employes

E. M. Harrison

Grand President

Brotherhood of Maintenance of Way
Employes

T. C. Carroll

President

The Order of Railroad Telegraphers

J. E. Leighty

President

Brotherhood of Railroad Signalmen of
America

Joe Clark

President

Hotel & Restaurant Employees and
Bartenders International Union

Richard W. Smith

Vice President

WITNESS:

James A. Drury
Member,
National Mediation Board

Ronald E. Strode
Member,
National Mediation Board

WESTERN RAILROADS

LIST OF WESTERN CARRIERS REPRESENTED BY THE WESTERN CARRIERS' CONFERENCE COMMITTEE IN CONNECTION WITH NOTICES DATED ON OR ABOUT JUNE 20, 1956, SERVED UPON VARIOUS INDIVIDUAL WESTERN RAILROADS BY THE GENERAL CHAIRMEN, OR OTHER RECOGNIZED REPRESENTATIVES, OF THE ORGANIZATIONS LISTED BELOW, OF "DESIRE TO CHANGE AND INCREASE ALL EXISTING RATES OF PAY BY THE ADDITION THERETO OF TWENTY-FIVE (25) CENTS PER HOUR, EFFECTIVE AUGUST 1, 1956, THIS INCREASE TO BE APPLIED TO ALL TYPES OF RATES SO AS TO GIVE EFFECT TO THE REQUESTED INCREASE OF TWENTY-FIVE (25) CENTS PER HOUR", AND TO PROPOSALS SERVED BY THE INDIVIDUAL WESTERN RAILROADS ON ORGANIZATION REPRESENTATIVES OF THE EMPLOYEES INVOLVED THAT EXISTING RATES OF PAY BE DECREASED, EFFECTIVE AUGUST 1, 1956, IN THE AMOUNTS SET FORTH IN SUCH PROPOSALS.

ORGANIZATIONS

1. International Association of Machinists
2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
3. Sheet Metal Workers' International Association
4. International Brotherhood of Electrical Workers
5. Brotherhood Railway Carmen of America
6. International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers

ORGANIZATIONS

7. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
8. Brotherhood of Maintenance of Way Employees
9. The Order of Railroad Telegraphers
10. Brotherhood of Railroad Signalmen of America
11. Hotel & Restaurant Employes and Bartenders International Union (Joint Council, Dining Car Employees Union)

This authorization is co-extensive with provisions of current schedule agreements applicable to employees represented by the organizations listed above. Subject to the foregoing, and to indicated footnotes, the classes of employees covered by this authorization are indicated by "x" inserted in Columns 1 to 11, inclusive, below:

NOTE: - This authorization is subject to the stipulation contained in Letter of Understanding dated November 1, 1956.

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EASTERN CARRIERS' CONFERENCE COMMITTEE
WESTERN CARRIERS' CONFERENCE COMMITTEE
SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE

Chicago, Illinois
November 1, 1956

Mr. G. E. Leighty
Chairman
Employees' National Conference Committee
Eleven Cooperating Railway Labor Organizations
Chicago, Illinois

Dear Sir:

Referring to National Mediation Board Case No. A-5256:

It is understood that the language used in the authorizations of the Eastern, Western and Southeastern carriers, reading:

"This authorization is co-extensive with provisions of current schedule agreements applicable to employees represented by the organizations listed above"

is subject to the understanding that the parties have no intention of changing by expanding or contracting the scope of previous national wage increase agreements.

It is further understood that Article V of the Agreement signed this date covering dependant health and welfare benefits is subject to the provision now contained in appendices to The Travelers Insurance Company Group Policy Contract No. GA-23000 reading as follows:

"(Participation of individual carriers listed herein, as to the respective classes of employees, is limited to positions covered by the rates of pay rules of the individual schedule agreements. This shall be construed to mean that this policy contract shall cover and apply to the occupants of those positions which are covered by the Agreement of March 19, 1949, generally known as the 40-Hour Week Agreement, including subsequent agreements and understandings relating thereto. Subject to the foregoing the classes of employees covered by such participation are indicated by 'x' inserted in the appropriate columns below.)"

Please indicate your acceptance in the space indicated below.

Yours very truly,

EASTERN CARRIERS' CONFERENCE COMMITTEE

By: Frank J. Sorkel
Chairman

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WESTERN CARRIERS' CONFERENCE COMMITTEE

By: J.P. Loosne
Chairman

SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE

By: James R. Lee
Chairman

ACCEPTED:

EMPLOYERS' NATIONAL CONFERENCE COMMITTEE
ELEVEN COOPERATING RAILWAY LABOR ORGANIZATIONSBy: J. E. Feigley
Chairman

WITNESS:

Thomas A. O'Neill
Member,
National Mediation BoardLawren Edwards
Member,
National Mediation Board

EASTERN RAILROADS REPRESENTED BY THE EASTERN CARRIERS' CONFERENCE COMMITTEE IN THE HANDLING OF REQUEST OF ELEVEN NON-OPERATING RAILWAY LABOR ORGANIZATIONS DATED JUNE 20, 1956.

"to change and increase all existing rates of pay by the addition thereto of twenty-five (25) cents per hour, effective August 1, 1956, this increase to be applied to all types of rates so as to give effect to the requested increase of twenty-five (25) cents per hour."

ORGANIZATIONS

- | | |
|---|---|
| (1) International Association of Machinists | (7) Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees |
| (2) International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers | (8) Brotherhood of Maintenance of Way Employees |
| (3) Sheet Metal Workers' International Association | (9) The Order of Railroad Telegraphers |
| (4) International Brotherhood of Electrical Workers | (10) Brotherhood of Railroad Signalmen of America |
| (5) Brotherhood Railway Carmen of America | (11) Hotel and Restaurant Employees and Bartenders International Union (Joint Council Dining Car Employees Union) |
| (6) International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers | |

ALSO, CARRIERS' CONCURRENT WAGE DECREASE PROPOSALS, AS FOLLOWS:

"Decrease all existing rates of pay by six and one-half cents per hour (three cents per hour as pertains to Dining Car Employees) effective August 1, 1956, this decrease to be applied to all types of rates so as to give effect to the requested decrease of six and one-half cents per hour (three cents per hour as pertains to Dining Car Employees)."

This authorization is co-extensive with provisions of current schedule agreements applicable to employees represented by the organizations listed above. Subject to the foregoing, and to indicated footnotes, the classes of employees covered by this authorization are indicated by "x" inserted in the appropriate column below:

NOTE: This authorization is subject to the stipulation contained in Letter of Understanding dated November 1, 1956.

RAILROADS

RAILROADS	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Canadian Pacific Ry Co	x	x	x	x	x	x	x	x	x	x	x
Central Railroad Company of New Jersey	x	x	x	x	x	x	x	x	x	x	x
Central Vermont Ry Inc	x	x	x	x	x	x	x	x	x	x	x
Chicago Union Station Co	x	x	x	x	x	x	x	x	x	x	x
Cincinnati Union Terminal Co	x	x	x	x	x	x	x	x	x	x	x
Dayton Union Ry Co					x		x	x	x	x	x
Detroit Terminal RR Co	x	x			x	x	x	x	x	x	x
Delaware & Hudson RR Corporation	x	x	x	x	x	x	x	x	x	x	x
Delaware, Lackawanna & Western RR Co	x	x	x	x	x	x	x	x	x	x	x
Detroit, & Toledo Shore Line RR Co	x	x	x	x	x	x	x	x	x	x	x
Detroit, Toledo & Ironton RR Co	x	x	x	x	x	x	x	x	x	x	x
Erie Railroad Company	x	x	x	x	x	x	x	x	x	x	x
Grand Trunk Western RR Co	x	x	x	x	x	x	x	x	x	x	x
Hoboken Shore RR Co					x			x	x	x	x
Indianapolis Union Ry Co	x	x		x	x		x	x	x	x	x
Lake Terminal RR Co						x					
Lehigh & New England RR Co	x	x	x	x	x		x	x	x		
Lehigh Valley RR Co	x	x	x	x	x	x	x	x	x	x	x
Long Island Rail Road Co	x	x	x	x	x	x	x	x	x	x	x
Maine Central RR Co	x	x	x	x	x	x	x	x	x	x	x
Portland Terminal Co	x	x	x	x	x	x	x	x	x	x	x
Monon RR Co	x	x	x	x	x	x	x	x	x	x	x
Monongahela Ry Co	x	x	x	x	x	x	x	x	x	x	x
Monongahela Connecting RR Co				x	x	x	x	x	x		
Montour RR Co	x	x	x	x	x	x	x	x			
Newburgh & South Shore Ry Co	(D)	x	x	x	x	x	x	x			
New York Central System											
<u>New York Central RR Co</u>											
Eastern District (Excl. Boston Division)	x	x	x	x	x	x	x	x	x	x	x
Boston Division	x	x	x	x	x	x	x	x	x	x	x
Grand Central Terminal	x	x	x	x	x	x	x	x	x	x	x
Buffalo Stock Yards											
Western District	x	x	x	x	x	x	x	x	x	x	x
Ohio Central Lines	x	x	x	x	x	x	x	x	x	x	x
Northern District	x	x	x	x	x	x	x	x	x	x	x
Southern District	x	x	x	x	x	x	x	x	x	x	x
Peoria & Eastern	x	x	x	x	x	x	x	x	x	x	x
L & J B & R R	x	x	x	x	x	x	x	x	x	x	x
Indiana Harbor Belt RR Co	x	x	x	x	x	x	x	x	x	x	x

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RAILROADS

NOTES:

- (A) - Ann Arbor
 - Includes Repairmen in the Marine Department at Elkharta, Michigan.
 - (B) - Ann Arbor
 - Includes Exclusive Purfers.
 - (C) - Baltimore & Ohio
 - Includes Supervisors of Mechanics below the rank of General Foremen in the Mechanical Department, and employees of Cumberland Reclamation Plant (Rolling Mill), represented by System Federation No. 30,
R. B. D.

NOTES: (continued)

(D) - Bessemer & Lake Erie
Lake Terminal
Monongahela Connecting
Newburgh & South Shore
Union
Youngstown & Northern

)
The question of allocating 2 1/2¢ per hour
(\$4.25 per month) to health and welfare
benefits or to wages will be handled on the
property if adjustment has not already been made.

(E) - NYC RR - Boston Division

- Includes Railroad Crossing Police.

(F) - NYC RR - Western District

- Includes Train Maids, Dormitory Car Porters, and Utility Men.

(G) - Central Railroad of New Jersey

- Includes the New York & Long Branch and Wharton & Northern railroads.

FOR THE CARRIERS:

JTE Jones

Chicago, Ill.
November 7, 1956.

FOR THE EMPLOYEES:

I. E. Feigty

RAILROADS

ORGANIZATIONS

	Machinists	Boilermakers- Blacksmiths	Sheet Metal Workers	Electrical Workers	Carmen	Firemen and Oilers	Clerks	Maintenance of Way Employees	Telegraphers	Signalmen	Dining Car Employees
	1	2	3	4	5	6	7	8	9	10	11
Alton and Southern RR.	x	x	x		x	x	x	x	x	x	x
Atchison, Topeka and Santa Fe Ry., The	x	x	x	x	x	x	x	x	x	x	x
Gulf, Colorado and Santa Fe Ry.	x	x	x	x	x	x	x	x	x	x	x
Penhandle and Santa Fe Ry.	x	x	x	x	x	x	x	x	x	x	x
Balt Railway Company of Chicago, The	x	x	x	x	x	x	x	x	x	x	
Camas Prairie RR.	x	x	x	x	x	x	x	x	x	x	x
Chicago & Eastern Illinois RR.	x	x	x	x	x	x	x	x	x	x	x
Chicago & Illinois Midland Ry.	x	x	x	x	x	x	x	x	x	x	x
Chicago and North Western Ry.	x	x	x	x	x	x	x	x	x	x	x
Chicago and Western Indiana RR.	x	x	x	x	x	x	x	x	x	x	x
Chicago, Burlington & Quincy RR.	x	x	x	x	x	x	x	x	x	x	x
Chicago Great Western Ry.	x	x	x	x	x	x	x	x	x	x	x
Chicago, Milwaukee, St. Paul and Pacific RR.	x	x	x	x	x	x	x	x	x	x	x
Chicago Produce Terminal Co.	x	x	x	x	x	x	x	x	x	x	x
Chicago, Rock Island & Pacific RR.	x	x	x	x	x	x	x	x	x	x	x
Chicago, St. Paul, Minneapolis & Omaha Ry.	x	x	x	x	x	x	x	x	x	x	x
Colorado and Southern Ry., The	x	x	x	x	x	x	x	x	x	x	x
Colorado and Wyoming Ry., The	x	x	x	x	x	x	x	x	x	x	x
Denver and Rio Grande Western RR., The	x	x	x	x	x	x	x	x	x	x	x
Denver Joint Car Interchange & Inspection Bureau											
Denver Union Terminal Ry., The	x	x	x	x	x	x	x	x	x	x	x
Des Moines Union Ry.	a-x	a-x	a-x	a-x	a-x	a-b-x	a-x	a-x	a-x	a-x	
Duluth, Missabe & Iron Range Ry.	x	x	x	x	x	x	x	x	x	x	
Duluth, South Shore and Atlantic RR.											
Duluth Union Depot & Transfer Co., The											

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	1	2	3	4	5	6	7	8	9	10	11
Duluth, Winnipeg & Pacific Ry.	x	x	x	x	x	x	x	x	x	x	
Elgin, Joliet and Eastern Ry.	x	x	x	x	x	x	x	x	x	x	
El Paso Union Passenger Depot Co.						x					
Fort Worth and Denver Ry.	x	x	x	x	x	x	x	x	x	x	x
Joint Texas Div. of CRI&P RR. and FtW&D Ry.	x	x	x	x	x	x	x	x	x	x	x
Galveston, Houston and Henderson RR.	x	x	x	x	x	x	x	x	x	x	
Great Northern Ry.	c-x	x	x	x	x						
Green Bay and Western RR.	x	x	x	x	x	x	x	x	x	x	
Keweenaw, Green Bay and Western RR.						x	x	x	x	x	
Houston Belt & Terminal Ry.	x	x	x	x	x	x	x	x	x	x	
Illinois Central RR.	x	x	d-x	e-x	x	f-x	g-x	x	x	x	h-x
Chicago and Illinois Western RR., The					x	x	x	x			
Illinois Northern Ry.	x	x	x	x	x	x	x	x	x		
Illinois Terminal RR.	x	x	x	x	x	x	x	x	x		
Kansas City Southern Ry., The	x	x	x	x	x	x	x	x	x	x	
Arkansas Western Ry., The								x	x		
Fort Smith and Van Buren Ry.								x	x		
Kansas City, Shreveport and Gulf Term. Co., The							x				
Joplin Union Depot Co.	x	x	x	x	x	x	x	x	x		
Kansas City Terminal Ry.	x	x	x	x	x	x	x	x	x	x	
King Street Passenger Station (Seattle)								x			
Litchfield and Madison Ry.					x	x	x	x	x		
Los Angeles Junction Ry.	x						x	x			
Louisiana & Arkansas Ry.	x	x	x	x	x	x	x	x	x	x	
Manufacturers Ry.	x				x						
Midland "alley" RR.	x	x	x	x	x	x	x	x	x		
Kansas, Oklahoma & Gulf Ry.					x	x	x	x	x		
Oklahoma City-Ada-Atoka Ry.						x	x	x	x		
Minneapolis & St. Louis Ry., The	x	x	x	x	x	x	x	x	x		
Railway Transfer Co., City of Minneapolis						x	x	x	x		
Minneapolis, St. Paul & Sault Ste. Marie RR.	x	x	x	x	x	x	x	x	x	x	x
Minnesota Transfer Ry.	x	x	x	x	x	x	x	x	x	x	x
Missouri-Kansas-Texas RR.	x	x	x	x	x	x	x	x	x	x	x
Missouri-Kansas-Texas RR. Co. of Texas	x	x	x	x	x	x	x	x	x	x	x
Beaver, Made and Englewood RR.											

	1	2	3	4	5	6	7	8	9	10	11
Union Terminal Co. (Dallas)	x	x		x	x	x	x	x	x	x	
Wabash RR.	x	x	x	x	x	x	x	x	x	x	x
Walla Walla Valley Transportation Co.							x	x			
Western Pacific RR., The	x	x	x	x	x	x	x	x	x	x	x
Western Weighing and Inspection Bureau						x					

NOTES:

- a - The question of allocating 2½¢ per hour (\$4.25 per month) to health and welfare benefits or to wages will be handled on the property if adjustment has not already been made.
- b - Authorization includes hostlers and assistant hostlers on Iron Range Division only.
- c - Authorization includes King Street Station.
- d - Authorization includes Section "A" and Section "B" Agreements.
- e - Authorization includes Section "A" and Section "B" Agreements, but does not include electrical workers, helpers and apprentices under Agreement dated July 11, 1939, applicable to the Illinois Central Hospital.
- f - Authorization includes watchmen, deckhands, firemen and shop laborers covered by Agreement dated July 1, 1939, applicable to Illinois Central Railroad employees on Steamer "Pelican" at Helena, Arkansas. Authorization does not apply to power plant employees and roundhouse and shop laborers covered by Agreement dated October 1, 1942, applicable to the Illinois Central Hospital.
- g - Authorization does not include clerical workers, machine operators, and station employees and laborers, covered by agreement effective January 1, 1955, applicable to the Illinois Central Hospital.
- h - Authorization includes chefs, cooks, waiters, waitresses, busboys, etc., covered by Agreement dated September 1, 1942, applicable to Illinois Central Station restaurant employees.
- i - Authorization includes red caps.

FOR THE CARRIERS:

b

FOR THE ORGANIZATIONS:

Chicago, November 1, 1956.

SOUTHEASTERN RAILROADS

which have authorized their representation

by

SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE - 1956

in the handling of proposals for

INCREASE OF 25¢ PER HOUR

submitted on behalf of certain employee groups (so-called "non-ops"),
on or about June 20, 1956

and for

CERTAIN DECREASES IN EXISTING RATES OF PAY

submitted by such railroads to such employee groups

on or about June 29, 1956

such authorization, as to the respective classes of employees, being co-extensive with the provisions of current schedule agreements applicable to the employees represented by the organizations referred to above. Subject to the foregoing, the classes of employees covered by this authorization are indicated by ✓ in the appropriate columns below.

(Note: This authorization is subject to the stipulation contained in Letter of Understanding dated November 1, 1956.)

RAILROADS	Clerks	Asst. of Ray	Telegraphers	Signalmen	Mechanists	Boilermakers	Blacksmiths	Bricklayers	Sheet Metal	Electrical	Carmen	Painters	Glass	Shop Laborers	O.C. Employees	Notes
Atlantic Coast Line	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Atlanta & West Point (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Western Railway of Alabama (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Atlanta Joint Terminal (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Augusta Union Station (a)	✓															
Birmingham Southern (b)	✓															
Central of Georgia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Charleston & Western Carolina	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Chesapeake & Ohio	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Clinchfield (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Florida East Coast (c)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Georgia (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Gulf, Mobile & Ohio	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Jacksonville Terminal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Kentucky & Indiana Terminal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Louisville & Nashville (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Nashville, Chattanooga & St. Louis (a)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Norfolk & Portsmouth Belt Line	✓	✓														
Norfolk & Western	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Richmond, Fredericksburg & Potomac	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Potomac Yard	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Richmond Terminal	✓															
Seaboard Air Line	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Southern	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Alabama Great Southern	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Cincinnati, New Orleans & Texas Pacific	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Georgia Southern & Florida	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Harriman & Northeastern	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
New Orleans & Northeastern	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
New Orleans Terminal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
St. Johns River Terminal	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Tennessee Central	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Virginian	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

Ed. the Railroads

J. E. Feighty
For the Employees

Carrier's Exhibit "B".

Chicago, St. Paul, Minneapolis & Omaha Railway
St. Paul Union Depot Co.
Minnesota Transfer Railroad Co.
System Division No. 4

The Order of Railroad Telegraphers

December 19, 1957.

Mr. T. M. Van Patten,
Personnel Officer,
Chgo, & Northwestern (CStPM&O) Railway,
400 West Madison Street,
Chicago 6, Illinois.

Dear Sir:

Please accept this as a formal notice under the provisions of the Railway Labor Act, specifically Section 6, of the desire of the General Committee of The Order of Railroad Telegraphers on the Chicago and North Western (C. St. P. M. & O.) Railway Company to amend the current agreement by adding a rule reading:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the Organization."

Please advise place, time and date for initial conference. Your attention is directed to the status quo provisions of the Railway Labor Act, Section 6.

Yours truly,

/s/ Geo. J. Schueler,
General Chairman, Chicago, St. Paul,
Minneapolis & Omaha Railway.

Carrier's Exhibit "B-1".

The Order of Railroad Telegraphers

Chicago & North Western System

Division No. 76

December 23, 1957.

Mr. T. M. Van Patten,
Director of Personnel,
C. & N. W. Railway Co.,
400 W. Madison Street,
Chicago 6, Illinois.

Dear Sir:

Please accept this as a formal notice served under the provisions of the Railway Labor Act, specifically Section 6, of the desire of the General Committee of The Order of Railroad Telegraphers on the Chicago and North Western Railway Company to amend the current agreement by adding a rule reading:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the Organization."

Please advise place, time, and date for initial conference.

Your attention is directed to the status quo provisions of the Railway Labor Act, Section 6.

Yours respectfully,

/s/ R. B. Boyington,
General Chairman.

RBB:HD

Carrier's Exhibit "C".

BEFORE SPECIAL BOARD OF ADJUSTMENT No. 215.

Nathan Cayton, Chairman

Award No. 1.

Case No. 1.

Parties to Dispute:

Brotherhood of Railway and Steamship Clerks, Freight
Handlers, Express and Station Employees,
and

Duluth, Missabe and Iron Range Railway Company,
Duluth, South Shore and Atlantic Railroad Company,
Great Northern Railway Company,
Lake Superior and Ishpeming Railroad Company,
Minneapolis, St. Paul and Sault Ste. Marie Railroad,
Northern Pacific Railway Company.*

The Committees of the Eastern, Western and Southeastern Carriers' Conference and the Employes' National Conference Committee met in Chicago, commencing November 19, 1957, and disposed of a number of disputes involving interpretations and applications of Article VI—Duration of Agreement of November 1, 1956, which disputes had been referred to them for determination.

The Committee jointly notified the National Mediation Board of their inability to agree with reference to two certain disputes (of which this is one) and that they would select the undersigned as Neutral Member and Referee. The National Mediation Board has officially certified the appointment of the undersigned in that capacity.

A hearing was conducted in Chicago, Illinois, on January

* Chicago and North Western Railway Company was originally a party to this dispute but both sides agree that that company is no longer a party and should be eliminated.

28, 1958 in the course of which it was stipulated that this dispute would be submitted for the sole decision of the undersigned and that such decision would be binding on all parties concerned. Statements of Committee representatives and counsel were received, and briefs have also been submitted.

The question for decision has been stated as follows:

"Is the notice served by the Organizations on the above-named carriers on or about March, 1957 for—

'A stabilized season of employment for all ore dock employees we represent under our ore dock agreement for a period of not less than eight (8) months consisting of not less than 1,386½ hours exclusive of overtime except holidays, in each calendar year.'

barred under Article VI of the November 1, 1956 Agreement?"

The applicable and relevant portions of the Article in question are as follows:

"Article VI—Duration of Agreement."

The purpose of this Agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending notice to—

(a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement.

(b) Increase or decrease the rate of compensation provided in existing agreements or understandings, or eliminate or establish agreements providing the rate of compensation, covering overtime payments, arbitrary payments, Sunday or holiday payments; time paid for but not worked, or increase or decrease the number of paid holiday or paid vacation days.

(e) This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment, separation allowances or other matters not prohibited by the foregoing provisions of this Article VI."

The question is whether the language just quoted acts as a bar to the demand of the ore dock workers for the "stabilized season of employment" above described.

The Carriers point to the expressed contractual purpose to fix the general level of compensation during the three-year period and to the language prohibiting either party from serving or progressing any notice which would increase or decrease rates of pay or the rate of compensation provided in the agreement covering time paid for but not worked. The Carriers contend that the purpose of the prohibitory language was to give assurance that Carrier's labor costs would, during the life of the contract, be stabilized against the possibility of increases in wages or changes in rules (but subject to cost of living increases).

The Carriers say that the employes' demand, if honored, would indisputably raise the general level of compensation for ore dock employes and would force the seven carriers involved to enter into agreements providing pay for time not worked, and that this is under the prohibition of the contractual moratorium.

For the employes it is contended that the proposal is one "dealing with stabilization of employment" which is reserved and excepted under Section (e) of Article VI, quoted above. Counsel for the Employes Conference Committee also argues that any question as to whether the proposal would result in time paid for but not worked goes to the merits of the proposal rather than to its "permissibility" as a subject of negotiations. They say the merits of the proposal are not before this Board and that it does not call for any payment for time not worked.

Both sides have built arguments bearing on supposedly conflicting provisions or phrases within Article VI and how such conflicts ought to be resolved. The Referee sees no need to choose between the diverse approaches taken by disputants to parts or the whole of Article VI; he thinks the ordinary and time-tested rules of contract construction provide a completely fair and satisfactory approach, and that for the purposes of this dispute, we can by reading the Article as a whole find the proper basis for decision.

The Article recites that the purpose of the Agreement is to fix the general level of compensation for the three years of its duration. It divests employes' organizations of the right to serve or progress any notice which would increase rates of pay or provide compensation in the form of time paid for but not worked. (It reserves, as we have seen, the right to serve notices dealing with stabilization of employment.)

Was this a reservation of a right to demand a guaranteed or assured minimum period of employment within a season or other period during a given year? The Referee thinks not. One need not have vast experience in order to be aware of the vagaries of climate and commerce and the effect they have on the rise and fall of activity in the ore dock business. If ore dock workers wish to contend for the right to an assured minimal employment of eight months a year, or (as stated) $1,386\frac{2}{3}$ hours, then it is reasonable to suggest that such should be sought by contract negotiations at the expiration of the existing three-year agreement. Parenthetically, it may be noted that if this group of employees has the right to progress such a demand, then there would seem to be no sound reason to deny the same right to other groups in the industry. The Referee is aware that the Notice speaks of a "stabilized season of employment" but what has already been said indicates that adoption of such phraseology does not bring this case within Article VI(e).

It seems clear that the proposal here made in behalf of ore dock workers would increase their rates of pay (fixed in preceding Articles of the Agreement) by, in effect, providing for their compensation on a seasonal rather than an hourly or weekly basis, and without regard to the needs of the industry or the amount or volume of its business. This is not stabilization of employment in any reasonable or fair sense.

The proposal is not aimed to preserve a status quo with respect to employment, but rather to guarantee a certain amount of work each year, with the inevitable result of placing upon the Carriers a potential liability for payment for time not worked,—a liability it would not have in the absence of such a guarantee.

It follows that the proposal would supersede the existing agreement and increase the rate of compensation governing "time paid for but not worked" and that this would be violative of the November 1, 1956 Agreement.

As we have seen, employes' counsel argues that the "proposal does not in terms call for any payment for time not worked." But we may assume that the employees are not seeking a mere "paper" victory and that if "permissibility" is established, they would (as would be their right) presumably lose little time in translating it into a negotiated financial advantage in the form of pay for a fixed number of hours per season, whether work is available for them or not. This the language of the contract does not permit. The Notice served March 1, 1957 must be held barred.

/s/ Nathan Cayton,
Chairman and Neutral Referee,
Special Board of Adjustment
No. 215.

Washington, D. C.

March 4, 1958.

Carrier's Exhibit "D".**Before Special Board of Adjustment No. 215.****Nathan Cayton, Chairman.****Award No. 2.****Case No. 10.****Parties to Dispute:**

**Brotherhood of Railway and Steamship Clerks, Freight
Handlers, Express and Station Employes,
and**

Erie Railroad.

The Carriers' Conference Committees and Employes' National Conference Committee met in Chicago commencing November 19, 1957, and disposed of a number of disputes involving interpretation and applicability of Article VI—Duration of Agreement. The Committees agreed that two cases would be deadlocked and referred to a neutral referee for final and binding decision. The parties agreed upon the undersigned as the Neutral Referee to decide these cases, and this designation has been confirmed by the National Mediation Board.

A hearing was held in Chicago on January 28, 1958, at which certain documents and arguments were presented; and later a brief for the employes was submitted February 8, 1958.

The question presented for decision is whether progression of a notice to amend a rule served by the Brotherhood is barred by the Agreement of November 1, 1956. The rule sought to be amended is Rule 20-2(d) which reads:

"(d) Seven Day Positions—

On positions which have been filled seven (7) days per

week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

The Brotherhood proposes that the Rule be amended to include the following language:

"The seven (7) day position referred to herein are those positions which, on August 31, 1949, were assigned and filled seven (7) days per week."

The portions of the November 1, 1956 Agreement which are here applicable are as follows:

"Article VI—Duration of Agreement

The purpose of this Agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending noticee to—

(a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement.

(b) Increase or decrease the rate of compensation provided in existing agreements or understandings, or eliminate or establish agreements providing the rate of compensation covering overtime payments, arbitrary payments, Sunday or holiday payments, time paid for but not worked, or increase or decrease the number of paid holiday or paid vacation days.

(c) This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment separation allowances or other matters not prohibited by the foregoing provisions of this Article VI."

The Brotherhood denies that the proposed rule would in any way modify the rules of the current Agreement per-

taining to the rate of compensation applicable to Sunday service, overtime service or rest day service. The Brotherhood also contends that even if the adoption of the proposed rule would have the effect of making Sunday the rest day on certain positions to which other rest days are now assigned and thus bring Sunday service on these positions under the application of existing rules governing application for service on rest days, the proposal would still not be barred by Article VI of the Agreement. Another contention of the Brotherhood is that the amendment would merely "implement" the 40-hour week agreement and help determine which are rest days.

For the Carrier, it is contended that the matter is covered by Article VI of the current Agreement and that the Brotherhood's proposal would require overtime payments for Sunday work in violation of that agreement. The Carrier has also taken the position that the proposed amendment, if adopted, would apply in any situation where the Carrier has seven-day operations where positions were not assigned and filled seven days a week on August 31, 1949.

By Contract dated March 19, 1949, a 40 hour week was established, effective September 1, 1949. In an explanatory "Note" preceding the effectuating language, the following is said:

"The expressions 'positions' and 'work' used in this Article II refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees."

The provision dealing with our subject reads:

"(d)—Seven day positions—

On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

It will be seen that the language just quoted is identical with Rule 20-2(d) which is here sought to be amended.

The Carrier has referred us to a considerable background of disputes, interpretations and decisions dealing with this general subject. In the brief submitted in behalf of the Brotherhood, we are given other background references in support of the employes' position. But counsel for the Brotherhood says in his brief: "We do not believe that any of this history of controversy has any relevance to the determination of the dispute before this Board."

With this last statement the Referee finds himself in agreement. In the first place, he thinks it is not the function of this Board to construe the 1949 agreement. A construction most favorable to the employes would require the Carrier to establish no more seven-day positions than had been actually established and worked prior to September 1, 1949. I think it cannot be said for the purposes of this decision that such is the only proper or reasonable construction.

Nor are we put to the necessity of reconciling or choosing between conflicting decisions or arbitration or adjustment boards which, on one hand, have afforded carriers a certain degree of flexibility in establishing seven-day positions (with Saturday and Sunday as straight time or pro-rata days) and those which, on the other hand, have imposed restrictions on carriers in establishing such positions.

We are to deal with the situation before us in the light of the contract and the practical effect of the proposed amendment. The amendment would require a freezing of seven-day positions as they existed on August 31, 1949, with no right by Carrier to establish the number of such positions with relation to the number of existence a reasonable time before that pivotal date. Thus the adoption of the proposal would result in imposing even heavier restrictions with respect to assigning days other than Sun-

days as rest days than would be imposed by the most restrictive interpretations of the 40-hour week Agreement in the Arbitrator or Board decisions cited by the parties. The inevitable result would be to require premium pay for Sunday as such, or to increase overtime payment for Sunday by establishing it as a day of rest in situations where it was not so established or regarded in the past. This would be violative of Article VI of the current Agreement in that it would override present contractual standards of compensation and increase rates of pay for Sunday work.

The progression of the Notice served by the organization of July 2, 1956 is barred.

/s/ Nathan Cayton

Nathan Cayton,

*Chairman and Neutral Referee
Special Board of Adjustment
No. 215.*

Washington, D. C.

March 4, 1958.

Carrier's Exhibit "E"

C&NW Positions Coming Under Scope of Agreement with ORT Abolished Since December 3, 1957.

Location	Date of Abolishment	Position	Authority
<i>By Reason of Line Abandonment.</i>			
Deep River, Ia.	7-15-58	Agent	Interstate Commerce Commission Order 19691, dated 6-4-58
Hartwick, Ia.	"	"	"
What Cheer, Ia.	"	"	"
<i>By Reason of Consolidation with Other Railroads.</i>			
Eldora, Ia.	4-15-58	"	Iowa State Commerce Commission Order A-5692 11-4-57, consolidated with M&STL. ORT agreement secured 4-10-58.
Luverne, Ia.	"	"	Iowa State Commerce Commission Order A-5693 11-4-57, consolidated with M&STL. ORT agreement secured 4-10-58.

Location	Date of Abolishment	Position	Authority
Lake Mills, Ia.	"	"	Iowa State Commerce Com- mission Order A-5695 3-10- 58, consolidated with M& STL ORT agreement se- cured 4-10-58.

By Reason of Actual Closing.

Cottonwood, S. D.	5-14-58	"	Public Utilities Commis- sion of South Dakota Order F-2499 5-9-58.
Lisbon, Ia..	3-15-58	"	Iowa State Commerce Com- mission Order A-5677, dated 12-18-57.
St. Peter, Minn. (Dakota Division)	1-31-58	"	Minnesota Railroad & Warehouse Commission Order A-7541 11-4-57. Twin Cities Division station still open at St. Peter.
Whitney, Neb.	4-11-58	"	Nebraska State Railway Commission Order No. 19240.

By Reason of Central Agency Program.

Location	Date of Abolishment	Agent	Authority
Athol, S. D.	5-14-58	Agent	Public Utilities Commission of the State of South Da- kota Order F-2499, 5-9-58.
Mansfield, S. D.	"	"	"
Columbia, S. D.	"	"	"
Houghton, S. D.	"	"	"
Astoria, S. D.	"	"	"
Gary, S. D.	"	"	"
Elkton, S. D.	"	"	"
Castlewood, S. D.	"	"	"
Bruce, S. D.	"	"	"
Volga, S. D.	"	"	"
Turton, S. D.	"	"	"
Conde, S. D.	"	"	"
Ferney, S. D.	"	"	"
Agar, S. D.	"	"	"
Seneca, S. D.	"	"	"
Lebanon, S. D.	"	"	"
Miranda, S. D.	"	"	"
Rockham, S. D.	"	"	"
Zell, S. D.	"	"	"
Frankfort, S. D.	"	"	"
Raymond, S. D.	"	"	"
Henry, S. D.	"	"	"
Hitchcock, S. D.	"	"	"
Weesington, S. D.	"	"	"
St. Lawrence, S. D.	"	"	"
Ree Heights, S. D.	"	"	"
Harrold, S. D.	"	"	"
Carthage, S. D.	"	"	"
Lake Preston, S. D.	"	"	"
Canistota, S. D.	"	"	"
Canova, S. D.	"	"	"

Plaintiff's Exhibit No. 11.

Location	Date of Abolishment	Position	Authority
Monroe, S. D.	"	"	"
Hurley, S. D.	"	"	"
Alcester, S. D.	"	"	"
Wakonda, S. D.	"	"	"
Montrose, S. D.	"	"	"
Hartford, S. D.	"	"	"
Valley Springs, S. D.	"	"	"
Farmer, S. D.	"	"	"
Fulton, S. D.	"	"	"
Oelrichs, S. D.	"	"	"
Buffalo Gap, S. D.	"	"	"
Whitewood, S. D.	"	"	"
Nisland, S. D.	"	"	"
Underwood, S. D.	"	"	"
Quinn, S. D.	"	"	"
Fort Pierre, S. D.	"	"	"
Fairfax, S. D.	"	"	"
Herrick, S. D.	"	"	"
Dallas, S. D.	"	"	"
Colome, S. D.	"	"	"
Wood, S. D.	"	"	"
Low Moor, Ia.	8-13-58	"	Order Iowa Commerce Commission Docket A-5726, 8-11-58.
Grand Mound, Ia.	"	"	"
Wheatland, Ia.	"	"	"
Clarence, Ia.	"	"	"
Stanwood, Ia.	"	"	"
Mechanicsville, Ia.	"	"	"
Norway, Ia.	"	"	"
Toledo, Ia.	"	"	"
Montour, Ia.	"	"	"
Clutter, Ia.	"	"	"
Buckingham, Ia.	"	"	"
Stout, Ia.	"	"	"
Dougherty, Ia.	"	"	"
Dumont, Ia.	"	"	"
Joice, Ia.	"	"	"
Scarville, Ia.	"	"	"
Chelsea, Ia.	"	"	"
Colo, Ia.	"	"	"
Randall, Ia.	"	"	"
Sheldahl, Ia.	"	"	"
Whitten, Ia.	"	"	"
Beaman, Ia.	"	"	"
Garwin, Ia.	"	"	"
Lawn Hill, Ia.	"	"	"
Ellsworth, Ia.	"	"	"
Hubbard, Ia.	"	"	"
Harcourt, Ia.	"	"	"
Farnhamville, Ia.	"	"	"
Auburn, Ia.	"	"	"
Dayton, Ia.	"	"	"
Stanhope, Ia.	"	"	"
Breda, Ia.	"	"	"
Woolstock, Ia.	"	"	"
Thor, Ia.	"	"	"
Rutland, Ia.	"	"	"
Goldfield, Ia.	"	"	"

Location	Date of Abolishment	Position	Authority
Irvington, Ia.	"	"	"
Fairfax, Ia.	"	"	"
Ledyard, Ia.	"	"	"
Lone Rock, Ia.	"	"	"
Dolliver, Ia.	"	"	"
Bradgate, Ia.	"	"	"
Linn Grove, Ia.	"	"	"
Peterson, Ia.	"	"	"
Maurice, Ia.	"	"	"
Granville, Ia.	"	"	"
Sutherland, Ia.	"	"	"
Ireton, Ia.	"	"	"
Craig, Ia.	"	"	"
Salix, Ia.	"	"	"
Beaver, Ia.	"	"	"
Scranton, Ia.	"	"	"
West Side, Ia.	"	"	"
Vail, Ia.	"	"	"
Woodbine, Ia.	"	"	"
Irwin, Ia.	"	"	"
Manning, Ia.	"	"	"
Arthur, Ia.	"	"	"
Battle Creek, Ia.	"	"	"
Castana, Ia.	"	"	"
Danbury, Ia.	"	"	"
Lake View, Ia.	"	"	"
Galva, Ia.	"	"	"
Quashong, Ia.	"	"	"
Moville, Ia.	"	"	"
Pierson, Ia.	"	"	"
Modale, Ia.	"	"	"
River Sioux, Ia.	"	"	"
Ashton, Ia.	"	"	"
Hospers, Ia.	"	"	"

Location	Date of Abolishment	Position
Oakes, North Dakota	4- 1-58	Tel-Clk
Butterfield, Minn.	8-30-58	Tel-Clk
Boone, Iowa	2-17-58	Train Dispatcher
Hermansville, Mich.	5-19-58	Telegrapher
Kaukauna, Wis.	2-28-58	Tel-Clk
Hermansville, Mich.	4- 1-58	Tel-Clk
O'Neill, Neb.	7-10-58	Tel-Clk
Spooner, Wis.	5-27-58	Tel-Clk
Bloomer, Wis.	4- 5-58	Telegrapher
St. James, Minn.	3-11-58	Train Dispatcher
St. Paul, Minn.	1-16-58	Agent
West Bend, Wis.	1-16-58	Tel-Clk
Sangamon St. Tower (Chgo.)	4-11-58	Tel-Lev.
Sangamon St. Tower (Chgo.)	4-11-58	Tel-Lev.

C&NW Positions Coming Under Scope of Agreements with ORT

Established Since December 3, 1957.

7- 1-58	12-31-58	Long Pine, Neb.	2nd Tel-Clk.	006-082
2-15-58	P	Chadron, Neb.	3rd Tel-Clk.	015-082
12-15-57	P	Gordon, Neb.	Agt. Tel.	001-080
12-15-57	P	Chadron, Neb.	2nd Tel-Clk.	014-082
4- 1-58	P	Oakes, N. Dak.	Agt. Tel.	002-080
5- 5-58	P	Tracy, Minn.	Tel. Clk.	004-082
3-20-58	P	Hawarden, Ia.	Tel. Clk.	003-082
4-10-58	P	So. Elgin, Ill.	Tel. Agt.	001-080
3-17-58	P	Speer, Ill.	Stud. Tel.	002-083
6-30-58	P	Barr, Ill.	Stud. Tel.	004-083
		Cedar Rapids, Ia.	Tel. Lev. Clk.	011-082
			Tel. Lev. Clk.	011-082
6- 1-58	P	Boone, Ia.	Asst. Ch. Tr. Disp.	017-075
4-17-58	P	Belle Plaine, Ia.	Tel-Clk.	012-063
2-10-58	P	Des Moines, Ia.	Tel-Clk.	015-082
5- 1-58 to 10-31-58		Conover, Wis.	Agt. Tel.	001-080
5-15-58	12-31-58	Siemens, Mich.	1st Tel-Clk.	001-083
		Siemens, Mich.	2nd Tel-Clk.	002-083
5-15-58 to 12-31-58		Ashland Ore Dock	Tel. Clk.	010-083
4- 1-58 to 12-15-58		Tesch, Mich.	Tel. Lev.	002-083
		Escanaba, Mich.	Tel. Clk.	005-082
		Stambaugh, Mich.	Tel. Clk.	003-082
		Powers, Mich.	Tel. Clk.	003-082
		Stager, Mich.	Tel. Clk.	004-082
		Escanaba, Mich.	Tel. Clk.	003-082
2-11-58 to P		Green Bay, Wis.	Asst. Ch. Tr. Disp.	002-075
2-11-58 to P			Tel-Clk.	016-082
1-15-58—P		Norfolk, Neb.	3rd Tel. Clk.	011-082
6- 1-58—P		East Yard, Minn.	IDP-Opr. Yd. Clk.	105-007
5-15-58—P		Eau Claire, Wis.	IDP-Opr. Yd. Clk.	110-007
			1st Tel. Clk. Lev.	001-083
11-16-57—P		Heron Lake, Minn.	2nd Tel. Clk. Lev.	002-083
11-16-57 P		Shakopee, Minn.	3rd Tel. Clk. Lev.	003-083
11- 1-57 P		Clear Lake, Minn.	Stud. Tel.	002-083
		Fall Creek, Wis.	Stud. Tel.	003-083
7-16-58—P		Eiroy, Wis.	Stud. Tel.	002-083
3- 1-58—P		Adams, Wis.	Tel. Clk.	002-082
4-10-58—P		Kedzie Ave. Tower	Tel. Clk.	005-082
			Director-Leverman	004-083

PLAINTIFF'S EXHIBIT NO. 12.

National Railroad Adjustment Board.

Third Division.

220 South State Street.

August 22, 1958.

Mr. G. E. Leighty, President
The Order of Railroad Telegraphers
3860 Lindell Blvd.,
St. Louis 8, Mo.

Dear Sir:

Written notice of intention to file ex parte submission within thirty days of August 22, 1958, has been received from Mr. T. M. Van Patten, Director of personnel, Chicago and North Western Railway Company, in dispute involving, briefly and for identification purposes only, the following:

That the notices served by the Order of Railroad Telegraphers on the carrier, dated December 19, 1957 and December 23, 1957 are in contravention of Article VI of the Agreement of November 1, 1956..

Mr. Van Patten's notice indicates copy thereof was sent to you. You are, therefore, respectfully requested to file with the Third Division of the Adjustment Board within the same period of time, or by September 22, 1958, fifteen copies of your submission prepared in accordance with requirements contained in Circular No. 1 issued October 10, 1934, and Motion adopted by the Division on November 26, 1957.

Copy of motion adopted November 26, 1957, if not previously furnished you, is enclosed for your ready reference.

Kindly acknowledge receipt.

Yours very truly,

National Railroad Adjustment Board,
Third Division,

A. Ivan Tummon,

Executive Secretary.

cc—Mr. T. M. Van Patten,

Mr. R. C. Williamson,

Mr. G. J. Schueler.

PLAINTIFF'S EXHIBIT NO. 13.

Memorandum Agreement Between Chicago and North Western Railway Company and Certain Non-Operating Labor Organizations.

Supplemental Unemployment Benefits.

Signed at Chicago, Illinois

December 27, 1956

Memorandum Agreement Made This Twenty-Seventh Day of December, 1956 by and Between the Chicago and North Western Railway Company and the Chicago, Saint Paul, Minneapolis and Omaha Railway Company and the Following Labor Organizations: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; International Association of Machinists; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; Brotherhood Railway Carmen of America; Sheet Metal Workers International Association; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Brotherhood of Maintenance of Way Employes; Joint Council of Dining Car Employees Union, Local 351, Hotel and Restaurant Employees and Bartenders International Union; United Transport Service Employes; American Railway Supervisors Association; Railroad Yardmasters of America.

It is hereby agreed that supplemental unemployment benefits will be paid as follows:

1.(a) Except as provided in paragraph 1(b) hereof, employes who are separated from their employment on or subsequent to May 8, 1956 and who qualify for and receive

unemployment benefits under provisions of the Railroad Unemployment Insurance Act, as amended, will in addition to such unemployment benefits, so long as eligible for and actually receiving such benefits, be considered qualified for and receive from the railway company supplemental unemployment benefits as follows:

(1) If the daily benefit rate in column 2 of Sub-section (a) of Section 2 and the paragraph immediately following the table, of the Railroad Unemployment Insurance Act, as amended August 31, 1954, or as may be subsequently amended, with respect to any employee is less than an amount equal to 60 per centum of the daily rate of compensation for the employee's last employment in which he engaged for the Chicago and North Western Railway System in the base year, such daily benefit rate shall be increased to such amount but not to exceed a total daily benefit rate under the Act and hereunder of \$10.20. The daily rate of compensation referred to in this paragraph shall be as determined by the railway company from the payroll records or in the event a dispute arises, by agreement between the Director of Personnel for the railway company and the General Chairman of the organization involved.

(2) An employee who has fifteen (15) or more years' continuous service with the railway company and who qualifies for supplemental unemployment benefits hereunder and receives compensation during a benefit year under the Railroad Unemployment Insurance Act to the extent of the full benefits available under such Act and continues unemployed until a new benefit year starts under the Act in which he had sufficient earnings in the base year to qualify for payment in the benefit year, will be paid by the railway company for one (1) such interim period 60 per centum of the daily rate of compensation for the employee's last employment, with a maximum of \$10.20 per day, but in any event not exceeding the amount payable per day had the employee qualified under paragraph 1(a)(1) hereof. Employees who accept benefits under

this paragraph but who are not eligible to receive benefits under the Railroad Unemployment Insurance Act because of being employed or otherwise disqualified under that Act, will forfeit their seniority with the railroad company and may be subject to such other action as the railroad company desires to take, provided that this provision shall not apply if the sole reason for such ineligibility to receive benefits under the Railroad Unemployment Insurance Act is that such employes have exhausted their full benefits in the benefit year. Payment to any individual employe under this paragraph (2) shall not in any event be for in excess of six (6) months during the three (3) year interim period herein contemplated.

1. (b) In addition to the disqualifying conditions provided for in the Railroad Unemployment Insurance Act, employes in the following categories will not be considered as covered by paragraph (a) above:

1. Those employes who are paid Railroad Retirement physical disability annuity or those employes who have attained age eligible to receive Railroad Retirement age annuity.

2. Those employes whose continuous service with the railway company is less than two (2) years at the time of termination of employment.

3. Employes who absent themselves from service account strike; and employes who are laid off as a result of emergency conditions such as flood, snow storm, hurricane, earthquake, fire, or strikes on these or other railroads or in other industries, provided the carrier's operations are suspended in whole or in part as a result thereof.

4. Those employes who voluntarily resign from the service rather than accept or continue employment on basis of their seniority for which they were qualified and which was available to them.

5. Those employes dismissed or suspended from the service for cause, including union shop citations.

6. Those employes who are on leave of absence

rather than accept or continue employment on basis of their seniority in their seniority district for which they are qualified and which is available to them.

7. Those employees who take a furlough status rather than accept full time employment on a comparable position in their regular craft or class for which they are qualified regardless of department or location where the railway company offers: (1) to assume cost of movement of employee and family and household effects to new location; and (2) that if such employee is furloughed within six (6) months after changing his point of employment and elects to move his residence back to his last point of employment, to assume cost of movement of employee and family and household effects to last point of employment.

8. Those employees occupying positions at the time of termination of employment who do not hold seniority in any seniority district.

9. Seasonal track forces laid off between October 1 of each year and April 1 of the following year as result of change from summer track maintenance force to winter track maintenance force. Any reduction in track forces below the average number employed at each location during the months of October 1955 to March 1956, both inclusive, will be considered other than a seasonal reduction.

10. Those employees receiving or eligible to receive separation or coordination allowance under the Washington Job Protection Agreement, other similar agreements, or Interstate Commerce Commission Order.

2. In the application of this memorandum agreement it is understood and agreed that the supplemental unemployment benefits provided for herein over and above those provided for in the Railroad Unemployment Insurance Act will not in any event be payable for days or for a greater number of days during a benefit year than are payable under the Act, except as provided in paragraph 1(a) (2) hereof. In no event will the total amount of benefits

provided for in the Act and hereunder paid to an employe for days of unemployment during a benefit year exceed the employe's compensation received from the Chicago and North Western Railway System in the base year.

3. Except as provided herein all other provisions of the Railroad Unemployment Insurance Act, as amended, are applicable to the supplemental benefits here provided.

4. Nothing contained herein will be construed as supplementing any sick benefits paid to employes under the Act regardless of whether such employe is or is not qualified to receive unemployment compensation under the Act.

5. It is contemplated by the parties hereto that, within a period of three (3) years from May 8, 1956, the Railroad Unemployment Insurance Act will or may be revised or amended in such a way as to increase the benefits now provided for thereina. The supplemental benefits outlined in this agreement are to be automatically reduced by the amount of any increase under the Act, and are limited to the three (3) year interim period herein contemplated.

6. It is understood and agreed that this memorandum agreement is in full and final settlement of the dispute growing out of notices served by the labor organizations parties hereto; on the carriers, covering formal request for agreements providing for severance pay, furlough allowances, separation allowances, displacement allowances, etc., such notices being dated as follows:

**Brotherhood of Railway and Steamship Clerks, Freight
Handlers, Express and Station Employees:**

May 8, 1956.

(Federated Crafts)	C&NW	CSTPM&O
International Association of Machinists)		
International Brotherhood of Boiler-)		
makers, Iron Shipbuilders, Blacksmiths,)		
Forgers and Helpers)		
International Brotherhood of Electrical)		
Workers)		
Brotherhood Railway Carmen of)		
America)	July 8, 1956	July 6, 1956
Sheet Metal Workers International)		
Association)		
International Brotherhood of Firemen,)		
Oilers, Helpers, Roundhouse and Rail-)		
way Shop Laborers)		
Brotherhood of Maintenance of Way)	Aug. 17, 1956	Aug. 28, 1956
Employees)		
Joint Council of Dining Car Employes)		
Union, Local 351, Hotel and Restaurant)		
Employees International Alliance and)		
Bartenders' International League of)		
America, American Federation of Labor)		
American Railway Supervisors Associa-)	May 18, 1956	
tion)		
Railroad Yardmasters of America)	May 15, 1956	May 19, 1956
United Transport Service Employes of)	May 29, 1956	
America)		
	May 10, 1956	

The purpose of this agreement is to alleviate undue hardship for the interim period, or until the Railroad Unemployment Insurance Act is revised or amended within that period. Therefore this agreement is not subject to change or modification during such three (3) year period, nor shall any labor organization or organization parties hereto during such period serve or process any notice covering changes in this agreement or dealing with stabilization of employment, separation allowance or other similar requests or demands, unless such requests or demands are

served by one or more of the organizations parties hereto on the railroads generally as a part of a national or western regional movement, in which event any national or western regional agreement reached may at the election of the organization or organizations parties hereto be substituted in its entirety for the protection hereby established in paragraphs 1(a)(1) and 1 (a)(2) hereof, Provided however that notwithstanding any such substitution the three year moratorium hereby established shall continue except as to other national or regional movements dealing with stabilization of employment, separation allowance or other similar requests or demands.

For The Chicago and North Western Railway Company and Chicago, Saint Paul, Minneapolis and Omaha Railway Company:

T. M. Van Patten,

Director of Personnel,

For the Labor Organizations, Chicago and North Western Railway: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

C. L. Dennis,

General Chairman,

International Association of Machinists:

Arthur D. Walsh,

General Chairman,

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers:

A. L. Kohn,

General Chairman,

International Brotherhood of Electrical Workers:

C. H. Foster,

General Chairman,

Brotherhood Railway Carmen of America:

Jack Cohan,

General Chairman,

Sheet Metal Workers International Association:

R. L. Steingraber,

General Chairman,

International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers:

Thos. Powell,

General Chairman,

Brotherhood of Maintenance of Way Employes:

J. F. Schultz,

General Chairman,

Joint Council of Dining Car Employees Union, Local 351, Hotel and Restaurant Employees International Alliance and Bartenders' International League of America, American Federation of Labor:

W. S. Seltzer,

General Chairman,

United Transport Service Employes of America:

T. Wilbur Winchester,

General Chairman,

American Railway Supervisors' Association:

E. R. Dean,

General Chairman,

Railroad Yardmasters of America:

L. J. Steft,

General Chairman,

For the Labor Organizations, Chicago, Saint Paul, Minneapolis and Omaha Railway:

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

C. L. Dennis,

General Chairman,

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers:

A. L. Kohn,

General Chairman,

International Brotherhood of Electrical Workers:

C. H. Foote,

General Chairman,

Brotherhood Railway Carmen of America:

Jack Cohan,

General Chairman,

Sheet Metal Workers International Association:

R. L. Steingraber,

General Chairman,

International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers:

Theo. Powell,

General Chairman,

Brotherhood of Maintenance of Way Employees:

Ernest L. Lee,

General Chairman,

American Railway Supervisors' Association:

Wm. L. Landergare,

General Chairman,

Railroad Yardmasters of America,

L. J. Steft,

General Chairman,

International Association of Machinists:

Waldo C. MacMillen,

General Chairman.

Chicago, Illinois.

PLAINTIFF'S EXHIBIT NO. 14.

National Railroad Adjustment Board.

Third Division

**220 South State Street,
Chicago 4, Illinois.**

August 25, 1958.

**Mr. T. M. Van Patten, Director of Personnel,
Chicago and North Western Railway Company,
400 West Madison Street,
Chicago 6, Illinois.**

Dear Sir:

This is to certify that by letter dated July 30, 1958 the Minneapolis & St. Louis Railway Company filed with the Third Division, National Railroad Adjustment Board, fifteen copies of Carrier's ex parte submission involving dispute as to whether the notice of the Order of Railroad Telegraphers, dated January 25, 1958, requesting an amendment to the current agreement as follows:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the Organization."

is barred by the moratorium provisions contained in Article VI of the National Agreement of November 1, 1956.

This case has not yet been docketed by the Third Division, National Railroad Adjustment Board and has not yet been assigned any docket number by the Board.

Yours very truly,

**A. Ivan Tummon,
Executive Secretary—Third Division.**

PLAINTIFF'S EXHIBIT NO. 15.

Third Division,
220 South State Street,
Chicago 4, Illinois.

August 26, 1958.

Mr. T. M. Van Patten,
Director of Personnel,
Chicago and North Western Railway Company,
400 West Madison Street,
Chicago 6, Illinois.

Dear Sir:

This is to certify that by letter dated August 22, 1958 the Chicago and North Western Railway Company filed with the Third Division, National Railroad Adjustment Board, fifteen (15) copies of Carrier's ex parte submission involving dispute—

That the notices served by the Order of Railroad Telegraphers on the carrier, dated December 19, 1957 and December 23, 1957 are in contravention of Article VI of the Agreement of November 1, 1956.

Yours very truly,

A. Ivan Tummön,
Executive Secretary,
Third Division.

PLAINTIFF'S EXHIBIT NO. 16.

July 18, 1958.

Mr. Frank J. Goebel, Chairman,
Eastern Carriers Conference Committee,
Signatory to Agreement of November 1, 1956,

Mr. T. Short, Chairman,
Western Carriers Conference Committee,
Signatory to Agreement of November 1, 1956,

Mr. C. A. McRee, Chairman,
Southeastern Carriers Conference Committee,
Signatory to Agreement of November 1, 1956,
Room 474 Union Station Building,
Chicago 6, Illinois.

Dear Sirs:

This is in reply to the letter you handed us during our meeting at the Statler Hotel, Washington, D. C., July 17, 1958, to which you attached decisions proposed by your Committees for joint adoption by them and the Employes' National Conference Committee with respect to three cases dealing with stabilization of employment in which disagreements had arisen between carriers signatory to the November 1, 1956 Agreement and organizations signatory to that Agreement as to the applicability of Article VI of that Agreement to notices served by those organizations under Section 6 of the Railway Labor Act.

There is much in your letter to which we cannot subscribe because of inaccuracies both of fact and of implication.

The oral agreement to which you refer for the handling by the Carriers' Conference Committees and the Employes' National Conference Committee of disputes concerning the application of Article VI of the November 1, 1956

Agreement is not precisely as you describe it and I shall therefore restate it in the context in which it was made. Preceding the Agreement of November 1, 1956, there had been intensive and extensive negotiations and discussions between the Carriers' Conference Committees and the Employes' National Conference Committee, particularly between our respective subcommittees, which eventuated in the Agreement. The preponderance of this discussion and negotiation was with respect to the subject matter that finally gave rise to Article VI of the Agreement. It was then our mutual conviction that all possible applications of Article VI had been so thoroughly discussed among us and that we so completely understood each other as to its meaning and application that it seemed unlikely that any disagreement could arise between the Carriers' Conference Committees and the Employes' National Conference Committee concerning its applicability or nonapplicability to any proposal that any party might make during the term of the Agreement. It was recognized, however, that individual carriers and organization committees on such carriers might not in all instances understand Article VI in the same way as the participants in the discussions understood it, and that consequently disagreements between such individual carriers and committees might arise with respect to specific proposals that one of the parties might seek to progress. The Agreement containing Article VI is a mediation agreement and hence such controversies arising over its meaning or application might be the subject of application to the National Mediation Board for an interpretation as to its meaning or application under Section 5 Second of the Railway Labor Act.

Because of the intimate knowledge and understanding that our Committees had as to the application of Article VI, and the relatively lesser actual participation of the

Mediation Board in developing its terms, it was mutually considered desirable that arrangements be made to utilize the knowledge of the Committees to resolve controversies arising on individual properties rather than to have them become subjects of application to the Mediation Board for interpretation. The Carriers' Conference Committees on the one hand and the Employes' National Conference Committee on the other agreed that they would exercise their best efforts, where controversies might arise on individual properties, to get the parties they respectively represent to apply Article VI in accordance with the knowledge and understanding of the respective Committees. It was thus anticipated that in most instances such disagreements as might arise on individual properties would be resolved practically at their inception.

It was recognized, however, that there might be instances in which neither the Carriers' Conference Committees nor the Employes' National Conference Committee would wish to express a judgment without an opportunity for conference between the respective committees. It was agreed that in such instances the Committees would meet, jointly consider the matter and make a joint decision. Although it was not considered likely that the Committees would be unable to agree as to the proper disposition of any such matter, cognizance was taken of the possibility of such disagreement. It was therefore further agreed that if such disagreement should arise the Committees would then explore possible means of resolving the disagreement and endeavor to find a mutually acceptable one.

At our meeting on July 15 we agreed that the Carriers' Conference Committees and the Employes' National Conference Committee should meet on the following day to give joint consideration in accordance with the oral Agreement above outlined to the disagreements that had arisen

concerning the applicability of Article VI to the proposals served on or about May 22, 1957 by the Brotherhood of Maintenance of Way Employes, and to other proposals by various organizations served on various carriers as to which disagreements had been submitted to the Committees, priority being given to the Brotherhood of Maintenance of Way Employes' proposals. You are in error in stating that there was any agreement that the meeting was "for the purpose of analyzing and discussing the ten separate requests contained in the Brotherhood of Maintenance of Way notice of May 22, 1957".

You are also in error in attributing to Mr. Carroll suggestions "that the parties meet for the purpose of definitely determining which, if any, of the items contained in the notice of May 22, 1957 were not barred as to initiation and progression by Article VI of the November 1, 1956 Agreement". Mr. Carroll had suggested many times since May 22, 1957 that the carriers establish Conference Committees to negotiate with the Brotherhood representatives concerning the notices of May 22, 1957 and that if in the course of negotiations it appeared that some items were questionable under Article VI efforts could be made to resolve such questions in negotiations and if they were not so resolved consideration could then be given to other appropriate means for their resolution. He has objected strenuously to the uniform and apparently concerted refusal to negotiate on grounds of the asserted blanket applicability of Article VI to bar the proposal in its entirety. He repeated these suggestions and objections at the meeting of July 15. The carrier representatives declared themselves to be without authority to negotiate in accordance with Mr. Carroll's suggestions.

Between the meetings of July 15 and July 16 the Employes' National Conference Committee gave intensive

consideration to the applicability of Article VI to those proposals before the Committee dealing with stabilization of employment, namely, the Brotherhood of Maintenance of Way Employes' proposal of May 22, 1957, the proposal of the Brotherhood of Railway and Steamship Clerks, Freight Handler, Express and Station Employes contained in its notice of February 11, 1958 on the Boston & Maine Railroad, and the proposal of The Order of Railroad Telegraphers contained in its notice of January 25, 1958 on the Minneapolis & St. Louis Railway Company. We felt the discussion with the Carriers' Conference Committee would be facilitated if we embodied the conclusions arrived at during our consideration in proposed decisions for presentation to the Carriers' Conference Committees at the beginning of our July 16 meeting. We handed you copies of those proposed decisions shortly after our meeting began and for convenience I am attaching copies hereto. We were in no way averse to discussion of the proposed decisions or of any decisions the Carriers' Conference Committees might have proposed in these cases. We were unwilling to enter upon discussions appropriate only to negotiations of the proposal with committees expressly disclaiming authority to negotiate.

Having failed in the effort to maneuver the Employes' National Conference Committee into engaging in the substance of negotiations with committees not authorized to negotiate, the Carriers' Conference Committees are now standing on the position that the proposals in all the three cases are barred by Article VI and that conclusion is expressed in the proposed decisions attached to your letter of July 17. Obviously, as we informed you during our meeting on July 17, we cannot join in these proposed decisions and you made it clear that the Carriers' Conference Committees would not join in the proposed decisions we handed you on the previous day. It is evident that the

Committees are unable to agree upon a joint disposition of these matters.

Under these circumstances the Employes' National Conference Committee has given careful consideration to possible means of resolving these differences. In all prior cases in which our Committees have explored this subject, the only means that either your Committees or our Committee has been able to suggest, and the only means of which we have been able to conceive in the present situation, is the selection or designation in some fashion of some outside arbiter or arbiters and the submission of the disagreement to such an ad hoc tribunal for decision. In view of our conception of the relationship of Article VI to the subject of stabilization of employment, as set forth in our proposed decisions, our Committee does not find it acceptable to relegate this matter to such decision. If the Carriers' Conference Committees with the Employes' National Conference Committee to give consideration to some other method of resolving the disagreement which we have not been able to think of our Committee will give consideration to it provided that I am promptly notified of your desires in this respect. Since we do not anticipate the suggestion of such alternative means, we feel that the handling of the matters involved in these three cases pursuant to our oral agreement has been concluded. The parties involved may be expected to proceed toward a composition of their differences under the procedures of the Railway Labor Act.

Since you, in your letter of July 17, have taken the occasion to express the view of the carrier representatives that the obligations devolving upon the parties under our oral agreement of November 1, 1956 were not fulfilled in this instance, it appears to us appropriate to add this general observation. The organizations represented by the Employes' National Conference Committee have consistently refused permission to their committees on individual car-

riers to initiate or progress proposals barred by Article VI as mutually understood on November 1, 1956. On the other hand, our experience indicates that in a very large proportion of instances in which committees of our organizations on individual carriers have sought to negotiate matters clearly not barred by Article VI, the carriers have almost automatically invoked Article VI as a bar to negotiations. The number of disagreements that have been submitted to our Committees to date falls far short of measuring the extent to which this has occurred. The Employes' National Conference Committee feels very strongly that the obligations devolving upon the Carriers' Conference Committees under the oral Agreement of November 1, 1956 to use their best efforts to get the carriers they represent to understand and apply Article VI as it was understood by those who negotiated it have not been fulfilled.

Very truly yours,

Employes' National Conference Committee,
Eleven Cooperating Railway Labor
Organizations,

By G. E. Leighty,

Chairman.

PLAINTIFF'S EXHIBIT NO. 19.**Interstate Commerce Commission.****Finance Docket No. 19432****Chicago, Saint Paul, Minneapolis & Omaha Railway Company Lease.****Decided December 28, 1956.**

Lease by the Chicago & North Western Railway Company of the lines of railroad and other properties owned, used, or operated by the Chicago, Saint Paul, Minneapolis & Omaha Railway Company, approved and authorized. Conditions prescribed.

Lowell Hastings, Jordan Jay Hillman, Burton K. Wheeler, Edward K. Wheeler, and Eldon S. Olson for applicant. Clarence M. Mulholland, Edward J. Hickey, Jr., and William G. Mahoney for Railway Labor Executives' association, intervener.

Report of the Commission.

Division 4, Commissioners Mitchell, Clarke, and Hutchinson by Division 4:

The Chicago and North Western Railway Company on July 24, 1956, applied under section 5(2) of the Interstate Commerce Act for authority to lease the lines of railroad and other properties owned, used, or operated by the Chicago, Saint Paul, Minneapolis and Omaha Railway Company, hereinafter referred to as the Omaha.

No representations have been made by any State authority and no objection to the granting of the application has been presented by shipper interests. The Railway Labor Executives' Association intervened in opposition to the application. Attempts were made by the applicant and

the intervener to agree upon whether the so-called "Oklahoma conditions", which, the applicant stated, would be acceptable to it, or the "New Orleans Terminal conditions", which the intervener preferred, should be imposed as conditions to the approval of the proposed transaction. The informal efforts were stalemated, and by order dated September 19, 1956, it was directed that the matter be handled by modified procedure in accordance with the Commission's rules of practice. The applicant filed its opening statement of fact and argument on October 15, 1956. By letter of October 30, 1956, the intervener agreed that the Oklahoma conditions would be accepted by it, and indicated that a reply to the applicant's opening statement would not be filed.

Under the circumstances discussed hereinabove, and recognizing that the requested authorization does not contemplate any change in the present transportation service to the public, it is our opinion that neither further modified procedure nor a public hearing is necessary in the public interest.

Subsequent to the acceptance by the applicant of the Oklahoma conditions, the labor organization on November 30, 1956, filed a petition for modification or clarification of the employee protective conditions. The petition purportedly was filed because information had been received by the petitioner indicating that a substantial number of railway employees "have already been adversely affected by action of the carrier parties in anticipation of I. C. C. approval of their pending lease agreement." The petitioner made specific reference to the closing of a large modern shop and certain changes in the employment of clerical forces. Based upon those allegations, the petitioner requests that the protective conditions be applied to cover employees whether they are affected by actions taken in anticipation of our approval of the lease or by

actions subsequent to such approval. The decision in *Pacific Electric Ry. Co. Abandonment*, 275 I. C. C. 649, 677, is cited as an applicable precedent.

The applicant filed a reply to the petition on December 6, 1956, and the petitioner filed an answer thereto. The latter was returned as being a reply to a reply not permitted under the Commission's rules. By letter dated December 13, 1956, counsel for the applicant summarized its position, and asserted that no employee of either carrier involved had been adversely affected in anticipation of our approval of the proposed lease. It is conceded, however, that the accounting forces of the two carriers have been substantially consolidated in accordance with the terms of the Washington Job Protection Agreement accepted by the carriers and the labor organizations that were involved. Notwithstanding the attempted refutation of the labor organization's contentions, the applicant states it would accept the requested ruling if we deem it to be in the public interest in this instance.

In view of the failure of the carriers involved and the organization representing railway employees to reach an agreement our approval and authorization of the proposed lease will be subject to the same conditions for the protection of adversely affected employees as those prescribed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177. To the extent that any action by either carrier herein, in anticipation of the approval of the proposed lease, adversely affects employees not otherwise protected by agreements amicably, arrived at, the aforesaid conditions will be applied to afford the protection required under section 5(2)(f) of the act. Disputes as to particular employees or groups of employees affected by actions of the carriers in anticipation of the approval of the lease, if any, may be resolved by following the procedure set forth in condition No. 8 of the Oklahoma

conditions (appearing at 257-I.C.C. 200), which provides for consideration and determination by an arbitration committee of questions regarding the eligibility for protection of persons and groups elsewhere described in the conditions.

Subject to the conditions for the protection of railway employees referred to, we find that the lease by the Chicago and North Western Railway Company of the lines of railroad and other properties owned, used, or operated by the Chicago, Saint Paul, Minneapolis and Omaha Railway Company, described herein, is a transaction within the meaning of section 5(2) of the Interstate Commerce Act; that the terms and conditions proposed are just and reasonable; and that the transaction will be consistent with the public interest.

• • • •

Conditions for Protection of Employes, Commonly Referred to as the "Oklahoma Conditions", Prescribed by the I. C. C. in Its Order Issued May 17, 1944 in Finance Docket 14221, Oklahoma Railway Company Trustees Abandonment of Operation, etc.

4. If, as a result of the abandonment of operation herein permitted and the purchases, etc., herein authorized; hereinafter referred to as the transaction, any employee of Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Company, of The Atchison, Topeka and Santa Fe Railway Company, or of Joseph B. Fleming and Aaron Colnon, trustees of The Chicago, Rock Island and Pacific Railway Company; hereinafter respectively referred to as the Oklahoma, the Santa Fe and the Rock Island, and collectively as the carriers, is displaced, that is placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority

rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of this transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position; provided, however, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee, provided, further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance, and provided, further, that no allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Oklahoma, with the Santa Fe or Rock Island if either of said two last named carriers offers him a position, the duties of which he is qualified to perform.

The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order.

5. If, as a result of the transaction herein approved, any employee, hereinafter referred to as a dismissed employee, of the carriers is deprived of employment with said carriers because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as result of the transaction herein approved, he shall be accorded a monthly dismissal allowance equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of this transaction. This allowance shall be made during the protective period to each dismissed employee while unemployed, provided, however, that no such allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island, if either of said two last named carriers offers him a position, the duties of which he is qualified to perform.

The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, should agree

upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

6. No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

7. Any employee retained in the services of the carriers involved in the transaction herein approved or who is later restored to service after being entitled to receive a dismissal allowance, and required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employees affected; provided, however, that changes in place of residence, subsequent to the initial change caused by the

transaction, which result from the exercise by the employee of his seniority rights shall not be considered as within the foregoing provision.

8. In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing Conditions Nos. 4, 5, 6, and 7, which cannot be settled by the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representatives.

9(a) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction herein approved and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to May 17, 1943, to be unaffected by the filing of the applications herein. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under the contract.

3. If the employee holds unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the consummation of the transaction herein approved and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within one year after the date employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively, and these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expense of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(Defendants' Exhibits 1-16, 19-21 and A, B and C were attached to the Answer and Answer to Amendment to Complaint. During trial the identical exhibits were introduced into evidence and made part of the Record as Defendants' Exhibits 1-16, 19-21 and A, B and C. These exhibits are printed in this Appendix at pages 32 to 68 and 70 to 73.)

DEFENDANTS' EXHIBIT NO. 7-A.

Dear Sir:

Please refer to your letter of February 10, 1958 concerning application for mediation received from the Order of Railroad Telegraphers covering a dispute between that organization and the C&NW on the following subject:

"Request for Rule reading:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the Organization."

Attached is copy of General Chairman Boyington's letter of December 23, 1957 with which the purported "Section 6 Notice" was served. Attached also are copies of my letter of December 24, 1957 to Mr. Boyington, copy of my letter of January 21, 1958 to Mr. Boyington, copy of Mr. Boyington's letter of January 27, 1958 to me, which indicate the correspondence which has been exchanged relative to this request. As is indicated in that exchange of correspondence, meeting was held with the General Chairman, at which time representative of the Grand Lodge of the O. R. T. was present, on January 17, 1958.

It is and has been the position of the carrier in handling this matter with the organization that the purported notice and request for rule does not in fact constitute proper subject for a Section 6 notice in that the notice does not in

fact concern "rates of pay, rules, and working conditions, • • •", the subject matter on which carriers and representatives of the employees are required to exercise every reasonable effort to reach agreements under the Railway Labor Act, but that on the contrary the purported notice constitutes a usurpation of the prerogative of management in determining its requirements of employees in the craft or class represented by the O. R. T. The attempted "rule" has no relation whatsoever to the rules, rates of pay, or working conditions applicable to positions, but constitutes an attempt to freeze positions regardless of the necessity for such positions.

In your letter you also called attention to the fact that the organizations had called attention to what they called the "status quo provisions, Section 6 of the Railway Labor Act". The carrier does not understand that in a case such as the instant case, where there is no rule but only a request for a rule, the service of a Section 6 notice and the status quo provisions can or do result in the carrier being required to operate as if the proposed rule was in fact already negotiated.

Your letter of February 10, 1958 does not indicate whether the application for mediation covers the entire C&NW (including the former CStPM&O Railroad); or is limited to telegraphers employed by the C&NW as it existed prior to the lease of the CStPM&O under the ICC authority. For your information, however, an identical request was received from the General Chairman of the O. R. T. on the Twin Cities Division—C&NW (former CStPM&O) and the exchange of correspondence between that General Chairman and the C&NW is substantially identical to the exchange of correspondence attached.

Yours truly,

(Signed) T. M. Van Patten.

BC: Messrs. B. W. Heineman, C. J. Fitzpatrick, L. S. Provo, S. C. Jones, C. McGowan.

DEFENDANTS' EXHIBIT NO. 12-A.

National Mediation Board
Washington

July 16, 1958

Case No. A-5696

Mr. T. M. Van Patten, Director of Personnel
Chicago & North Western Railway Co.
400 West Madison Street
Chicago 6, Illinois

Mr. G. E. Leighty, President
The Order of Railroad Telegraphers
3860 Lindell Blvd.
St. Louis 8, Missouri

Gentlemen:

Reference is made to dispute between your respective carrier and organization, in which mediation services of the Board were invoked by The Order of Railroad Telegraphers, described as follows:

"Request for Rule reading:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

For your information, the file in this case was closed on July 16, 1958, account of both parties' refusal to arbitrate.
By order of the National Mediation Board.

E. C. Thompson,
Executive Secretary.

DEFENDANTS' EXHIBIT NO. 17.

State of South Dakota
County of Minnehaha ss.

IN CIRCUIT COURT
Second Judicial Circuit.

The Order of Railroad Telegraphers,
Plaintiff,
vs.

Chicago and North Western Railway
Company and Roy Doherty, Chris
A. Merkle and Fred Lindekugel,
individually and as Public Utilities
Commissioners and as constituting
the Public Utilities Commission of
the State of South Dakota,
Defendants.

RETURN ON ORDER TO SHOW CAUSE AND MOTION
TO DISMISS.

The defendant, Public Utilities Commission of the State of South Dakota, and Roy Doherty and Fred Lindekugel, individually and as members of said Commission, as a showing and return to the Order to Show Cause issued herein, submit to the Court the following as grounds and reasons why said action should be dismissed as to said Defendants and the application for a temporary restraining order and permanent injunction should be denied.

I.

Chapter 52.05 of the South Dakota Code, 1939, relating to appeals from Orders of the Commission constitutes the sole, only and exclusive remedy "to review, reverse, cor-

rect, or annul any action of the Commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its duties." Petitions for rehearing, filed respectively May 21, May 26, June 2, June 7, and June 9th, 1958, were on June 13, 1958 denied and the Order duly served.

II.

Correctly construed the Commission's Order does not conflict with the Railroad Labor Act. The requirement in the Order for a progress report after the expiration of 120 days opened the door to any contingency which may arise including negotiations, strike, federal intervention, proceedings before the Mediation Board, Adjustment Board, or otherwise, in putting the Central Agency Plan into effect. The purpose of the Order is to obviate, if possible, the closing and complete withdrawal of agency service at 52 stations and continuing part-time agency service thereat. Hence, a service order is clearly authorized under Section 52.0202, which reads in part as follows:

"Section 52.0202: Whenever in the judgment of such Commission it shall appear that * * * any change of its stations * * * or any change in the mode of operating its line, or lines, or conducting its business is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the Commission shall inform such common carrier of the improvement or changes which it adjudges to be proper, by notice thereof in writing by leaving or mailing by registered mail a copy thereof, certified by its secretary, to or with any station agent, clerk, treasurer, or any director of such common carrier."

The only party to the Order is the Chicago and North Western Railway Company. The railroad company is "authorized and directed to forthwith (i. e., immediately

and with reasonable dispatch) to inaugurate and put in effect its proposed centralized agency plan." It directs the Railroad Company at the expiration of 120 days from the date thereof to "submit to the Commission a report of the progress being made in inaugurating its plan for central agency service." In its report, the Commission, on Page 9, states "it is not within our jurisdiction to interpret these (Labor Union) contracts." In legal effect, the Commission's Order requires good faith effort by the Railroad to carry it out. It contains no directive to circumvent the Railroad Labor Act, or violate any contract which may stand in the way of carrying out our service order.

III.

Section 52.0202 is the only statute under which the Commission may issue to a railroad a service order. Under it sidings have been built, trains operated and stations built. Section 52.0932, relating to station abandonment, is restricted to giving consent only.

Pursuant to the authority and direction of this statute (Section 52.0202) the Commission issued its Report and Order. Obviously, the Commission, under this Section of the Statute, after notice and hearing, with all the facts in 2054 pages of transcript, and 79 Exhibits before it in the exercise of its judgment and as directed by the statute was empowered to issue to the Chicago and North Western Railway a directory order to effectuate changes in any of its stations and mode of operating its lines, required in the public interest to (a) maintain its service and financial stability; and, (b) to keep and protect part-time agency service at the subject stations. The Report and Order was served on a station agent as required by this statute.

IV.

The Commission's Order is directed solely to the Chicago and North Western Railway Company, Plaintiff, if proceeding under Section 33.0403 as a party in interest, has not alleged in its complaint its interest in the case, or identified any named individual in whose behalf the action has been instituted. Constitutional rights flow only to one damaged by an Order of the Commission.

V.

Hearings by the Commission, after due notice, were held at Pierre, Huron and Rapid City, South Dakota, in this proceeding, embracing nine days.

Section 52.0202 does not fix the place where the Commission must hold a hearing. Its proceedings are controlled by Section 52.0109, which provides:

"Such Public Utilities Commission may in all cases conduct the proceedings, when not otherwise particularly prescribed by law, in such manner and places as will best conduce to the proper dispatch of business and the ends of justice."

Rule I Practice. "General sessions of the Commission for hearing of formal complaints will be held at its office in the Capital City of Pierre, on such days and at such hours as the Commission may designate."

VI.

A certified statement of the Secretary of the Commission showing the record relating to the issuance and service of the Report and Order in Docket F-2499 is attached as a part of this showing.

VII.

A copy of the Commission's Order denying petitions for rehearing is attached as a part of this return.

Wherefore, Defendants, the Public Utilities Commission, and the members thereof individually and as a Commission pray for judgment dismissing the action as to them and denying the relief demanded by the Plaintiff.

Herman L. Bode,

*Attorney for and Counsel
for the Said Defendants.*

Affidavit.

State of South Dakota, }
County of Hughes. } ss.

Herman L. Bode, being first duly sworn, deposes and says: That he is the Counsel for the Public Utilities Commission of the State of South Dakota; that he has read the foregoing Return on Order to Show Cause and Motion to Dismiss, and knows the contents thereof; and, that the facts stated therein are true to his own knowledge, except as to matters therein stated on information and belief and that as to such matters he believes them to be true.

Herman L. Bode.

Subscribed and sworn to before me this 16th day of June, 1958.

(Seal)

C. T. Nelson,
Notary Public.

My Commission expires Dec. 1, 1960.

Statement:

The Three Commissioners, Doherty, Merkle and Linden-kugel, met on Friday, May 9, on the question of the issuance of Order in Docket F-2499, the Chicago and North Western station consolidation case. The majority report had been written and Commissioner Merkle was working on his dissent.

Inasmuch as the Commission would not all be together again for a few days, it was agreed that the Report and Order would be dated May 9, and the work of cutting the stencil, mimeographing same, etc., started, but that the Order would not be mailed or promulgated until Commissioner Merkle had completed his dissent. This was done.

The material consisting of 19 pages with 300 copies of the document was all mimeographed and ready to mail on Monday afternoon, May 12, 1958. The envelopes had been addressed to all parties of record. It was then discovered that the envelopes could not hold the enclosure and new envelopes had to be addressed so that *none* of the Reports and Orders were mailed until Tuesday a.m., May 13, 1958. All parties of record were mailed notices at the same time and in the same mail and all by first class mail. At 12:00 Noon on May 13, 1958 I personally served a copy of the Report and Order on the Station Agent of the Chicago and North Western Railway Company, at Pierre, South Dakota, as required by Section 52.0202 of the South Dakota Code.

E. F. Norman,
Secretary.

A true statement of the record.

E. F. Norman,
Secretary.

Dated: June 16, 1958.
(Official Seal)

At a Regular Session of the Public Utilities Commission of the State of South Dakota, held in its offices, in the City of Pierre, the Capital, this 13th day of June, 1958.

Present: Commissioners Doherty and Lindekugel
(Merkle dissents)

In the matter of the Application of
The Chicago and North Western
Railway Company for Authority
to Revise, Adjust and Rearrange
its Agency Service in South
Dakota.

ORDER DENYING REHEARING (F-2499).

On the 9th day of May, 1958, the Commission issued its Report and Order in Docket F-2499, involving the Centralization of Agency Service at numerous stations on the Chicago and North Western Railway Company's lines in South Dakota, to which Report and Order, reference is hereby made.

On the 21st day of May, 1958, the Order of Railroad Telegraphers filed with the Commission a formal petition for rehearing; on May 26, 1958 the cities of Wessington Springs, Hitchcock, Athol, Houghton, Bonesteel, Mansfield and Northville jointly filed a formal petition for rehearing; and, on June 2, 1958, the cities of Hartford, Humboldt and Montrose, jointly, and the cities of Carthage and Canova, jointly, filed formal petitions for rehearing; and on June 7, 1958, the cities of Hermosa, Quinn, Oral, Buffalo Gap, Oelrichs, New Underwood, jointly, and Astoria, singly, filed formal petitions for rehearing; and on June 9, 1958, the town of Wood, singly, and the Farmers Co-operative Association of Dallas filed petitions for rehearing; and all appli-

cants, except Wood and the said Co-operative Association requested suspension of the Order issued in Docket F-2499, during the pendency of the petition for rehearing if granted.

Each of the several petitions filed after May 21, 1958, except Wood, and the Farmers Co-operative Association incorporate therein by reference the petition for rehearing filed by the Order of Railroad Telegraphers.

In disposing of these applications, the Commission deems it important to re-emphasize the precise nature of the Order it has entered. What it has done is to authorize and direct the carrier forthwith to place in effect the Central Agency Plan; and, pending further report by the carrier as to the actual operation of this Plan, it has deferred action upon the carrier's request for authority to abandon entirely the stations in question.

This Order is directed only to the carrier; and the carrier has acted to place it in effect. The Commission has thus far had no evidence whatsoever of any adverse effect upon shippers which would warrant withdrawal of the Order or suspension of its operation.

The Applications for Rehearing are founded in large part upon alleged contractual limitations upon the carrier which, if they do in fact exist, might interfere seriously with the economies and efficiencies to be realized by the carrier through the Central Agency Plan. The carrier, against whom this Order is solely directed, has not relied upon any such alleged contractual limitations as a reason why it should be excused from compliance. The effect of such limitations, if any do exist, presumably will be reflected in the report to be rendered by the carrier at the end of the 120-day period, at which time the Commission is to give further consideration to the carrier's request for authority to close the stations involved.

In its Report the Commission expressly stated that

whether such contractual limitations as are alleged to exist, do exist in fact, depends upon the proper interpretation to be given to the carrier's contracts—and we stated that this was beyond the Commission's province and jurisdiction. Reaffirming this view, we note that there were contained in our Findings and Order certain statements which make it appear as if we had interpreted these contracts, and which, in any event, are unnecessary to the exercise of the statutory power upon which our Order was based. Accordingly we deem it desirable to clarify, and we hereby amend our Findings and Order so as to eliminate and modify any statement therein which may be construed as an adjudication of the validity of or an interpretation or application of any labor agreement, or as a directive to violate any contract which may in fact exist or to circumvent the Railway Labor Act in connection with the execution of our Order, by eliminating Findings Nos. 6 and 7, and the words "at one agent's salary" in Finding No. 8, and the words "at one agent's wages" in the first ordering paragraph of our Order.

The Commission having considered the allegations of the several petitions for rehearing and reviewed the record in this proceeding; it is therefore

Ordered, that all Petitions and Applications for rehearing in Docket F-2499 be, and the same are, hereby denied.

By Order of the Commission:

E. F. Norman,

Secretary.

(Official Seal)

DEFENDANTS' EXHIBIT NO. 18.

The Association of Western Railways
Room 482, Union Station Building

D. P. Loomis, Chairman,
R. F. Welsh, Executive Secretary,
H. E. Greer, Secretary,

Chicago 6, November 9, 1956

Circular No. 772-11

Chief Operating Officers, Western Railways:
(Represented by Western Carriers' Conference Committee)

Referring to our Circular No. 772-9 of November 1, 1956, transmitting copies of agreement of that date between the carriers represented by the Eastern, Western and South-eastern Carriers' Conference Committees and their employees represented by the Eleven Cooperating Railway Labor Organizations:

The Carriers' Conference Committees and the Employes' National Conference Committee have entered into an understanding that controversies over the meaning or the application of the November 1, 1956 Agreement which are not settled on the individual properties will be referred to the Committees signatory to the Agreement for disposition. It was agreed that instructions to that effect would be issued by the three-regional bureaus to the railroads parties to the Agreement, and by the Employes' National Conference Committee to the respective General Chairmen of the Eleven Cooperating Railway Labor Organizations on the individual carriers.

The understanding contemplates that if the Committees signatory to the Agreement are unable to resolve the question, such Committees will then endeavor to agree upon a

method for final disposition of the dispute. If the Committees can neither resolve the question, nor agree upon a method for final disposition, it has been agreed that Section 5, Second, of the Railway Labor Act will then be invoked. Section 5, Second, reads as follows:

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for and interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

Accordingly, any controversy arising on your railroad concerning the meaning or application of the Agreement of November 1, 1956, which you are unable to settle on the property, should be submitted to the undersigned by letter (please furnish 30 copies thereof) containing all of the pertinent facts, for handling by the Carriers' Conference Committees and the Employes' National Conference Committee, Eleven Cooperating Railway Labor Organizations, pursuant to the understanding herein outlined.

Yours truly,

R. F. Welsh,
Executive Secretary.

DEFENDANTS' EXHIBIT NO. 21.

Decision.

The proposal of the Brotherhood of Maintenance of Way Employes contained in its notices of May 22, 1957 on the various railroads deals with stabilization of employment. Article VI, paragraph (e) of the November 1, 1956 Agreement excludes proposals on that subject from any restriction upon serving or progressing of notices pursuant to the Railway Labor Act or the negotiation of agreements pertaining thereto. Proposals of this character give rise to no dispute for resolution by the Carriers' Conference Committees and the Employes' National Conference Committee.

July 16, 1958

Washington, D. C.

DEFENDANTS' EXHIBIT NO. 22.

Decision.

The proposal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes contained in its notice of February 11, 1958 on the Boston and Maine Railroad deals with stabilization of employment. Article VI, paragraph (e) of the November 1, 1956 Agreement excludes proposals on that subject from any restriction upon serving or progressing of notices pursuant to the Railway Labor Act or the negotiation of agreements pertaining thereto. Proposals of this character give rise to no dispute for resolution by the Carriers' Conference Committees and the Employes' National Conference Committee.

July 16, 1958

Washington, D. C.

DEFENDANTS' EXHIBIT NO. 23.**Decision.**

The proposal of the Order of Railroad Telegraphers contained in its notice of January 25, 1958 on the Minneapolis and St. Louis Railway Company deals with Stabilization of Employment. Article VI, paragraph (e) of the November 1, 1956 Agreement excludes proposals on that subject from any restriction upon serving or progressing of notices pursuant to the Railway Labor Act or the negotiation of agreements pertaining thereto. Proposals of this character give rise to no dispute for resolution by the Carriers' Conference Committees and the Employes' National Conference Committee.

July 16, 1958

Washington, D. C.

DEFENDANTS' EXHIBIT NO. 24.

Letterhead of National Mediation Board, Washington.

Mediation Agreement

between

**Chicago Great Western Railway Company
and its employees represented by
Railroad Yardmasters of America
N.M.B. CASE No. A-5545**

In settlement of the differences involved in National Mediation Board Docket A-5545, as described in an application for mediation dated August 2, 1957, in accordance with the provisions of the Railway Labor Act, as amended, it is mutually agreed by and between the Chicago Great Western Railway Company and its employees represented

by the Railroad Yardmasters of America, that the questions in controversy shall be and are hereby disposed of as follows:

1—Effective December 1, 1952, monthly rates of pay are increased \$8.00, equivalent to the so-called Guthrie Award.

2—Parties hereto subscribe to and accept provisions of agreements between the Railroad Yardmasters of America and railroads represented by the Western Carriers' Conference Committee, identified as follows:

(a) Agreement dated August 12, 1954—N.M.B.
Case A-4521.

(b) Agreement dated January 25, 1956.

(c) Agreement dated May 3, 1957,—N.M.B.
Case No. A-5196.

under the same terms and conditions as applicable to parties to the original agreements. All employees who were on the payroll of the carrier on the effective dates of the several wage increases, or who were hired subsequent thereto, regardless of whether they are now in the employ of the carrier, shall receive the amounts to which they are entitled under the Agreements. In case any such employees are now deceased, the amounts due them will be paid the surviving widows, or in the absence of surviving widows, on behalf of dependent minor child or children, if any, or to their estates.

3—Carrier agrees to maintain during period provided in Article III of the Agreement of May 3, 1957, the Yardmaster positions assigned as of the date of this agreement, unless business conditions justify further reductions—in which event the Carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effected.

4—Separate Memorandum Agreements have been executed in connection with disputes involving deceased Yardmaster W. E. Schwader and R. Jefferson, formerly employed as Yardmaster at Minneapolis, Minnesota and are attached hereto and made a part of this settlement.

This agreement is in full and final settlement of all pending requests of the employees for changes in rates of pay, rules and working conditions.

Signed at Chicago, Illinois, this 6th day of December, 1957.

For the Employees:

/s/ M. G. Schoeh,

*President, Railroad Yardmasters
of America.*

For the Carrier:

/s/ D. K. Lawson,

*Assistant to President, Chicago
Great Western Railway Co.*

Witnessed:

/s/ W. G. Rupp,

*Mediator, National Mediation
Board.*

DEFENDANTS' EXHIBIT NO. 25.

Mediation Agreement between Railroad Yardmasters of America and Missouri-Kansas-Texas Lines.

In full, complete and final settlement of all differences set forth in files of Docket Cases Nos. A-5151 and A-5515 of the National Mediation Board, and under the provisions of the Railway Labor Act, as amended, it is hereby mutually agreed between the parties signatory hereto that all differences are disposed of as indicated herein.

It is agreed that Mediation Cases A-5151 and A-5515 covering Section 6 Notices of Railroad Yardmasters of America, dated April 2, 1956, and May 24, 1957, are disposed of as follows:

- (1) Carrier agrees to accept and apply National Agreement dated May 3, 1957, between railroads rep-

resented by the Eastern and Western Carriers' Conference Committees and their employes represented by the Railroad Yardmasters of America.

(2) Railroad Yardmasters of America agree to withdraw their Section 6 Notices of April 2, 1956, and May 24, 1957, and further agree not to progress similar notices until expiration of the period set out in Article III—(Duration of Agreement) of the agreement of May 3, 1957.

(3) Carrier agrees to maintain during period provided in Article III of the Agreement of May 3, 1957, the Yardmaster positions assigned as of the date of this agreement, unless business conditions justify further reductions—in which event the Carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effected.

Signed at Dallas, Texas, this 8th day of November, 1957.

For the Employees:

Railroad Yardmasters of America,
/s/ M. G. Farrow,
*General Chairman and Deputy
President.*

Approved:

/s/ M. G. Schoch,
President.

For the Company:

Missouri-Kansas-Texas Lines,
/s/ A. F. Winkel,
Assistant General Manager.

Witnessed:

/s/ O. L. Keiter,
Committeeman & Vice Chairman.

/s/ Ross R. Barr,
*Mediator, National Mediation
Board.*

COLLOQUY.

(Portion of the Statement of Hon. J. Sam Perry, Judge, on September 8, 1958 concerning Paragraph 20 of the Findings of Fact and Conclusions of Law.)

"So, as I understood it, his testimony was that he was willing to negotiate, as I understood his testimony, that he was at all times ready to deal with each one of these particular problems, he was willing to talk about probably entering some agreement, maybe leading to severance pay or something else, with respect to those who had already been replaced, specific items; but the general program of stability or the incorporation of this rule, I should say, he was unwilling to testify. I do not think there is any question of that, and I certainly did not impute, as far as I was concerned, anything except his viewpoint to it."

"I make those statements because I do not like 'that he refused to negotiate', that being in there, unless it is understood that it was with respect to this particular rule, because he was willing to talk about the problem."

"I object to the words 'on the merits' in there. I do not want the inference—"

"I am going to strike 'the merits of the' so that it will read:

"The plaintiff has refused to negotiate, confer, mediate or otherwise treat with defendant Telegraphers on the proposed change in agreement set forth in the Section 6 notice served by defendant Telegraphers on plaintiff on December 23, 1957."

so that it will limit his refusal to what his testimony was, and the testimony of the others, and that was that he refused only to negotiate with respect to this particular rule. I do not want this finding of fact to indicate that he was not willing to negotiate with respect to the specific layoffs, because I understood the testimony to be to the contrary.

"I think I ought to put something in there to make my position very clear on that, so there could be no question on a review of this."

IN THE UNITED STATES DISTRICT COURT.

(Caption—58-C-1538)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on to be heard on the Complaint and Amendment thereto and the Answers thereto filed by defendants, and the Court having set the matter for hearing, having heard the evidence and the arguments of counsel and being fully advised in the premises, the Court finds that:

1. Plaintiff, Chicago and North Western Railway Company, is a corporation duly organized and existing under the laws of the State of Wisconsin, with its principal place of business at 400 W. Madison Street, Chicago, Illinois. Plaintiff is a common carrier engaged in interstate commerce by railroad, and is a "carrier" within the meaning of that term, as defined in the Railway Labor Act, and is subject to the provisions of the Railway Labor Act and the Interstate Commerce Act.

2. Defendant, The Order of Railroad Telegraphers (hereafter referred to as "Telegraphers"), is a voluntary, unincorporated association and a labor organization which is the duly recognized, certified and acting collective bargaining agent pursuant to the Railway Labor Act for the class of employees working on plaintiff's railroad which is commonly described as station, tower and telegraph employees, and has been such collective bargaining agent for many years. Certain individual defendants sued herein are officers of said Association, as indicated in the caption of this complaint. The Order of Railroad Telegraphers and

each individual defendant is sued herein individually and as representative of the class of employees represented by said Association.

3. On December 23, 1957 defendant Telegraphers served formal notice under provisions of Section 6 of the Railway Labor Act (45 U. S. C. Sec. 156) to amend the current agreement between the Telegraphers and plaintiff railroad by adding a rule reading:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the carrier and the organization."

4. Plaintiff by letter dated December 24, 1957 acknowledged receipt of the Section 6 notice and took the position that the subject matter of the proposed rule was not a proper subject matter for a Section 6 notice. Plaintiff took the same position in the conference held between representatives of the plaintiff and Telegraphers on January 17, 1958, and reiterated the same position in a later letter dated January 21, 1958.

5. Under date of January 27, 1958 Telegraphers by R. B. Boyington, its General Chairman on the plaintiff railroad addressed a letter to the Director of Personnel for the plaintiff, T. M. Van Patten, referring to the prior correspondence of the parties restating the position taken at the conference that it was the hope of the representatives of the Telegraphers that through discussion plaintiff's representatives might be persuaded to confer with the defendants on the merits of the proposal. The letter further stated that inasmuch as the Telegraphers had been unsuccessful in persuading the representatives of the plaintiff to change its position and to secure a conference on the Section 6 proposal under the Railway Labor Act, there was no alternative except to treat the letters of the plaintiff dated December 24, 1957 and January 21, 1958 as a refusal to confer under the procedure of the Railway Labor Act and

that it was the intention of the Telegraphers to progress the Section 6 proposal under the procedure of the Railway Labor Act.

6. Under date of February 5, 1958 Telegraphers made application for the Mediation Services of the National Mediation Board.

7. Under date of February 24, 1958 the National Mediation Board by its Executive Secretary addressed a letter to the Director of Personnel of the plaintiff, Mr. T. M. Van Patten, and to the President of the Telegraphers, G. E. Leighty, advising that the application filed by the Telegraphers had been reviewed by the Board, advising further that the Board considered that apparently a proper Section 6 notice has been filed in this matter and accordingly the Board had docketed the application as Case No. 2-5696.

8. Thereafter, the National Mediation Board appointed a mediator to commence mediation with reference to the rule proposed by the Telegraphers, the subject of the Section 6 notice. The mediator met with the parties but was unable to persuade the representatives of the plaintiff to discuss the merits of the rule proposed by the Telegraphers and on May 27, 1958 the mediator informed the parties in writing that he had been unsuccessful in his mediation efforts and requested the parties to submit the dispute to arbitration in accordance with the provisions of the Railway Labor Act. Both parties declined arbitration.

9. A separate Section 6 notice was served on the Chicago, St. Paul, Minneapolis and Omaha Railway asking for a rule change identical with the rule change proposed in the Section 6 notice served by the Telegraphers on the plaintiff. The Chicago, St. Paul, Minneapolis and Omaha Railway Company no longer exists as an operating company, the operation of its railroad properties being carried on by the plaintiff, but the agreement between the Telegraphers and the Chicago, St. Paul, Minneapolis and

Omaha Railway Company has been continued in effect by the plaintiff and governs the relationship between the Telegraphers and the plaintiff as to employees engaged in such operations. The chronology of the handling of the Section 6 notice by the Telegraphers with the Chicago, St. Paul, Minneapolis and Omaha Railway and the actions taken by the plaintiff and the Telegraphers in connection with said notice were identical with the processing of the Section 6 notice served by the Telegraphers on the plaintiff except that the application for mediation was made under date of March 18, 1958 and the case was docketed by the National Mediation Board as Case No. A-5739. Both Case No. A-5739, and Case No. A-5696 involving the dispute between the Telegraphers and the plaintiff, were processed together before the National Mediation Board.

10. Under date of July 10, 1958 the Telegraphers submitted to its membership on the plaintiff property a strike ballot seeking the views of the membership as to whether a strike should be authorized if necessary to secure a satisfactory settlement of the dispute arising from the proposal of the Telegraphers to add to the existing agreements with the plaintiff the rule proposed under the Section 6 notice above referred to. The vote of the membership of Telegraphers on the strike ballot referred to above was almost unanimous in favor of a strike.

11. Under date of August 18, 1958 a strike call and instructions pertaining to conduct of strike were issued by the Telegraphers to all local chairmen, members and employees represented by the Telegraphers on the plaintiff railway and the Chicago, St. Paul, Minneapolis and Omaha Railway, being the Twin Cities Division of the Chicago North Western Railway, to commence on Thursday, August 21, 1958 at 6:00 A.M. Central Standard Time.

12. Under date of August 18, 1958 the National Mediation Board proffered its services on an emergency basis

under its emergency docket as Docket No. E 175. Both parties accepted the proffer. On August 20, 1958 by telegram addressed to the Director of Personnel of the plaintiff and to G. E. Leighty, President of the Telegraphers, the National Mediation Board advised that it was concluding its emergency effort and closing its file on Docket E 175 as of August 20, 1958.

13. On August 21, 1958, after the entry of the temporary Restraining Order by this Court, plaintiff wrote a letter to defendant Telegraphers for the first time taking the position that the Section 6 notice is barred by Article VI of the National Agreement of November 1, 1956 between most of the railroads in the United States and the non-operating railway labor organizations including the Telegraphers and stating that it was the purpose of the plaintiff to submit the question as to whether the Section 6 notice was so barred to the Third division of the National Railroad Adjustment Board for determination.

14. By letter dated August 22nd, the Telegraphers responded to this letter and called attention: (1) to the provisions of Section 5, Second of the Railway Labor Act specifying the National Mediation Board as the appropriate agency to interpret mediation agreements; (2) that the National Mediation Board held that a proper Section 6 notice had been served by the Telegraphers; (3) that the question raised as to application of the moratorium is not properly referable to the National Railroad Adjustment Board, not only because of the National Mediation Board has primary specific jurisdiction but because Section 2, First (i) of the Railway Labor Act permits reference to the Adjustment Board only of disputes growing of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions. Article VI of the National Agreement does not concern itself with rates of pay, rules or working conditions; (4) the matter has not been handled on the property in the usual manner.

15. On August 22, 1956 the plaintiff made an Ex Parte Submission to the Third Division of the National Railroad Adjustment Board attempting to submit to that agency a dispute whether the Section 6 notice served by Telegraphers was barred by the moratorium provisions, Article VI, of the National Agreement. Subparagraph (e) of Article VI specifically excepts from the operation of the moratorium "the serving of notices and the negotiation of agreements dealing with stabilization of employment.

16. Under date of November 9, 1956 the Association of Western Railways, of which the plaintiff is a member, issued Circular No. 772-11 to all the chief operating officers of Western Railways. This circular received by plaintiff calls attention to the fact that the Carriers' Conference Committees which represented the Chicago and North Western and the Employes' National Conference Committee, being the committee which represented the Telegraphers in the National Agreement, entered into an understanding that controversies over the meaning or application of the November 1, 1956 agreement which are not settled on the individual properties will be referred to the Committee's signatories to the agreement for disposition. The circular further provided that if the Committees signatories are unable to resolve the question, they would endeavor to agree upon a method for final disposition, and that if they are unable to agree upon a method of final disposition that Section 5 Second of the Railway Labor Act would then be invoked.

17. The proposed contract change incorporated in the Section 6 notice served by the defendant Telegraphers on December 23, 1957 relates to the length or term of employment as well as stabilization of employment. Collective bargaining as to the length or term of employment is commonplace. There are a variety of collective

bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads.

18. The contract change proposed by defendant Telegraphers in its Section 6 notice of December 23, 1957, relates to "rates of pay, rules and working conditions" and is a bargainable issue under the Railway Labor Act.

19. The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agreement on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on the plaintiff on December 23, 1957.

20. The plaintiff has refused to negotiate, confer, mediate or otherwise treat with defendant Telegraphers on the proposed change in agreement set forth in the Section 6 notice served by defendant Telegraphers on plaintiff on December 23, 1957. The plaintiff did show willingness to negotiate upon the central agency plan, including a possibility concerning severance pay.

21. The dispute giving rise to the proposed strike is a major dispute and not a minor grievance under the Railway Labor Act, and no issue involved therein is properly referable to the National Railroad Adjustment Board.

The Court concludes as a matter of law that:

1. The Complaint, as amended, fails to state a claim upon which relief can be granted, except for the issuance of an injunction expiring at midnight, September 19, 1958.

2. The defendant Telegraphers in serving and progressing its Section 6 notice of December 23, 1957 has

conformed to all of the procedures and requirements of the Railway Labor Act (45 U. S. C. 151 et seq.).

3. No issue involved in the proposed strike which plaintiff seeks to enjoin is properly referable to the National Railroad Adjustment Board.

4. The proposal contained in the Section 6 notice served on December 23, 1957 by the defendant Telegraphers upon the plaintiff presents an issue which is a proper subject of negotiation and is bargainable under the provisions of the Railway Labor Act (45 U. S. C. 151 et seq.).

5. The proffer of services on an emergency basis by the National Mediation Board and its acceptance by plaintiff and defendant Telegraphers initiated a new thirty-day cooling off period under the Railway Labor Act, running from the termination of such services on August 20, 1958.

6. The Court is without jurisdiction to grant injunctive relief, except for an injunction expiring at midnight September 19, 1958.

Enter:

/s/ Joseph Sam Perry,

*Judge of the United States
District Court.*

September 8th, 1958.

IN THE UNITED STATES DISTRICT COURT.
• • (Caption 58-C-1538) • •

DECREE.

This Matter coming on to be heard on the Complaint and Amendment thereto and the Answers thereto filed by defendants, and the Court having set the matter for hearing on the merits and having heard the evidence and the arguments of counsel and being fully advised in the premises, and the Court having made and entered this day its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, That defendants, members of the Order of Railroad Telegraphers, and their agents, servants, employees, officers and attorneys, and all persons employed by plaintiff on its railroad, and any persons acting in concert or participating with them, and any and all persons acting by, with, through or under them or by or through their order, be and they are hereby restrained until midnight, September 19, 1958 from ordering, authorizing, encouraging, inducing, approving, continuing, starting or permitting any strike on plaintiff's railroad.

It Is Further Ordered that the prayer for injunctive relief extending beyond September 19, 1958 and any other relief prayed for in the Complaint as Amended be and is hereby denied, and except for the relief hereinabove given, the Complaint as Amended is hereby dismissed.

Enter:

/s/ Joseph Sam Perry,
*Judge of the United States
District Court.*

September 8, 1958.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Chicago and North Western Rail-
way Company, a corporation,

Plaintiff,

vs.

The Order of Railroad Telegra-
phers, et al.,

Defendants.

Civil Action
No. 58 C 1538.
Equitable Relief
Demanded.

NOTICE OF APPEAL.

Notice is hereby given that The Order of Railroad Telegraphers, a voluntary association; James W. Whitehouse, Vice President of said association; Robert C. Williamson, General Chairman of said association; J. M. Jenks, General Secretary and Treasurer of said association; Reuel C. Robertson, Thorwald Larsen and Lawrence W. Nelson, Local Chairmen of said association, being all of the defendants in this cause, hereby appeal to the United States Court of Appeals for the Seventh Circuit from:

1. That portion of the Decree of the District Court entered September 8, 1958 restraining the defendants from striking until midnight, September 19, 1958.
2. The order of the District Court entered September 8, 1958 pursuant to Rule 62(c) of the Federal Rules of

Civil Procedure restraining any strike pending determination on appeal.

Alex Elson and Lester P. Schoene,
Attorneys for Defendants,
By Alex Elson,
One of Attorneys for Defendants.

Alex Elson,
11 S. LaSalle St.,
Chicago, Ill.,
Of Counsel,

Schoene and Kramer,
1625—K Street, N. W.
Washington 6, D. C.

United States of America, } ss.
Northern District of Illinois. }

Chicago and North Western Rail-
way Company, a corporation,
Plaintiff,

vs.
The Order of Railroad Telegra-
phers, et al.,
Defendants.

No. 58 C 1538.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 9, 1958 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Carl McGowan, Fred O. Steadry, Edgar Vanneman, Jr.,
and R. W. Russell,
400 West Madison Street,
Chicago 6, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 9th day of September, 1958.

Roy H. Johnson,

Clerk,

By Gizella Butcher,

Deputy Clerk.

(Seal)

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Chicago and North Western Rail-
way Company, a corporation,

Plaintiff,

vs.

The Order of Railroad Telegra-
phers, et al.,

Defendants.

Civil Action
No. 58 C 1538.
Equitable Relief
Demanded.

AMENDED NOTICE OF APPEAL.

Notice is hereby given that The Order of Railroad Telegraphers, a voluntary association; James W. Whitehouse, Vice President of said association; Robert C. Williamson, General Chairman of said association; J. M. Jenks, General Secretary and Treasurer of said association; Reuel C. Robertson, Thorwald Larsen and Lawrence W. Nelson, being all of the defendants in this cause, do hereby amend the Notice of Appeal filed September 9, 1958 and hereby appeal to the United States Court of Appeals for the Seventh Circuit from the following orders of the United States District Court:

1. The restraining order of August 20, 1958, and the orders of August 22, 1958 and August 27, 1958, extending the order of August 20, 1958.
2. That portion of the Decree entered September 8, 1958 restraining the defendants from striking until midnight, September 19, 1958.

Amended Notice of Appeal.

3. The order of September 8, 1958 entered pursuant to Rule 62(c) of the Federal Rules of Civil Procedure restraining any strike pending determination on appeal.

Alex Elson and Lester P. Schoene,
Attorneys for Defendants,
By Alex Elson,
One of Attorneys for Defendants.

Alex Elson,
11 S. LaSalle St.,
Chicago, Ill.,

Of Counsel:
Schoene and Kramer,
1625—K Street, N. W.
Washington 6, D. C.

United States of America, { ss.
Northern District of Illinois.

• • (Caption 58-C-1538) • •

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 10, 1958 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Messrs. Carl McGowan, Fred C. Steadry,
Edgar Vanneman, Jr., and R. W. Russell,
(Attorneys for plaintiff-appellee),
400 W. Madison Street,
Chicago 6, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 11th day of September, 1958.

Roy H. Johnson,

Clerk,

By Sarah Brown,

Deputy Clerk.

(Seal)

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Chicago and North Western Rail-
way Company, a corporation,
Plaintiff,

vs.

The Order of Railroad Telegra-
phers, a voluntary association;
James W. Whitehouse, Vice
President of said association;
Robert C. Williamson, General
Chairman of said association;
J. M. Jenks, General Secretary
and Treasurer of said associa-
tion; Reuel C. Robertson, Thor-
wald Larsen and Lawrence W.
Nelson, Local Chairmen of said
association,

Defendants.

Civil Action
No. 58 C 1538.

NOTICE OF APPEAL.

Notice Is Hereby Given that plaintiff Chicago and North Western Railway Company hereby appeals in the above entitled cause to the United States Court of Appeals for the Seventh Circuit, from that part of the decree entered on the 8th day of September, 1958, in the United States District Court, Northern District of Illinois, Eastern Division, which reads and provides as follows:

"It Is Further Ordered that the prayer for injunctive relief extending beyond September 19, 1958, prayed for in the Complaint as Amended be and is hereby denied, and except for the relief hereinabove given, the Complaint as Amended is hereby dismissed."

Carl McGowan,
Edgar Vanneman, Jr.,
R. W. Russell,
Attorneys for Plaintiff.
400 W. Madison Street,
Chicago 6, Illinois.

IN THE UNITED STATES DISTRICT COURT.

* * * (Caption 58-C-1538) * *

ADDRESSES OF DEFENDANTS FOR CLERK OF
THE DISTRICT COURT FOR MAILING NOTICES
OF APPEAL.

Mr. Alex Elson

Mr. Lester P. Schoene,

*Attorneys for the Order of
Railroad Telegraphers,*

Suite 3400—11 South LaSalle Street,
Chicago 3, Illinois,

Mr. James W. Whitehouse,
1205 Judson Avenue,
Evanston, Illinois,

Mr. Robert C. Williamson,
Room 1703—400 West Madison St.,
Chicago 6, Illinois,

Mr. Reuel C. Robertson,
2694 Joseph Avenue,
Des Plaines, Illinois,

Mr. Thorwald Larsen,
696 Thacker Street,
Des Plaines, Illinois,

Mr. Lawrence W. Nelson,
c/o Chicago and North
Western Railway Company,
Nelson, Illinois,

Mr. J. M. Jenks,
Room 1703—400 W. Madison Street,
Chicago 6, Illinois.

United States of America, } ss.
Northern District of Illinois. }

• (Caption—58-C-1538) • •

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 16, 1958 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Mr. Alex Elson,
Mr. Lester P. Schoene,
Attorneys for the Order of
Railroad Telegraphers,
Suite 3400—11 S. La Salle St.,
Chicago 3, Illinois.

Mr. James W. Whitehouse,
1205 Judson Avenue,
Evanston, Illinois.

Mr. Robert C. Williamson,
Room 1703—1400 W. Madison Street,
Chicago 6, Illinois.

Mr. Reuel C. Robertson,
2694 Joseph Avenue,
Des Plaines, Illinois.

Mr. Thorwald Larsen,
696 Thacker Street,
Des Plaines, Illinois.

Mr. Lawrence W. Nelson,
c/o Chicago and North Western Ry. Co.,
Nelson, Illinois.

Mr. J. M. Jenks,
400 W. Madison St. (Room 1703),
Chicago 6, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of September, 1958.

Roy H. Johnson,
Clerk.

By Sarah Brown,
Deputy Clerk.

(Seal)

IN THE UNITED STATES DISTRICT COURT.

* * * (Caption—58-C-1538) * *

Transcript of proceedings had in the above-entitled case before Hon. J. Sam Perry, one of the Judges of said Court, in his courtroom in the United States Court House, Chicago, Illinois, on Tuesday, September 16, 1958, at 10:00 o'clock, a.m.

The Court: Gentlemen, I am fully cognizant of the inconsistency of this order with my original order, and I want it clearly understood that I am acting solely under the rules and not on the merits of the case in this matter. I want that clearly understood.

I have given it further consideration and I am in whole-hearted agreement with Mr. Elson here that the two cases we have here, the Chicago River case, are not authority for me to act in this matter for the reason that in those instances the Court held that the Act didn't apply. Now, I have held, in effect, that the Act does apply. But I have given a lot of further consideration to it in this respect: No matter what the circumstances here, a state

court could have no jurisdiction because the field has been preempted by the Railway Labor Act, in my judgment. Therefore, no state court having any remedy whatsoever, the only remedy that could lie would be in this court.

In view of the fact that the court has said in several of those cases, including the River case, that the LaGuardia Act must be read and interpreted along with the Railway Labor Act in dealing with railway labor problems, I know of no place, no court that could have jurisdiction, except this one.

The Court: Well, gentlemen, I am going to sign the order as presented and I will not make any attempt to limit the time. However, I am going to add this paragraph:

"The Court respectfully suggests that the parties join herein to expedite the appeal herein because of the unusual legal, economic, and social problems involved." That is my viewpoint, and if the case were before me, I would do everything possible, as I have done I believe in this case, to expedite a hearing. This is the kind of a case that should have right of way. The statutes say that it should have the right of way in this Court and that will be the order. I am concerned. I don't want to exceed my jurisdiction, but I believe interpretation of the law gives me and imposes upon me the duty to act in this particular case. But I would like very much to have that reviewed, even if possible before the main point of the controversy is reviewed. I just like to know that I am acting within the realm of my jurisdiction. That is the order.

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—58-C-1538) • •

ORDER.

This matter having come on for a hearing upon plaintiff's motion for an injunction pending on appeal, and the plaintiff having duly filed a Notice of Appeal and Cost Bond, and the Court being advised in the premises,

It is hereby Ordered that an injunction issue under Rule 62(c) and accordingly it is Further Ordered that until the Court of Appeals of the Seventh Circuit decides plaintiff's appeal herein, the defendants, members of defendants' organization and its officers, their agents, servants, employees and attorneys, and all employees of plaintiff and any other persons in active concert and participation with them represented by the defendants, be and they hereby are restrained from ordering, authorizing, encouraging, inducing, approving, continuing, starting or permitting any strike on plaintiff's railroad.

It is Further Ordered that the Bond heretofore filed by plaintiff on September 9, 1958 remain in full force and effect as the Bond required by this order.

Nothing herein shall be construed to require an individual employee to render labor or service without his consent, nor shall anything herein be construed to make the quitting of his job by any individual employee an illegal act.

This Court respectfully suggests that the parties join herein to expedite the appeals herein because of the unusual legal, economic and social problem involved herein.

Enter:

J. S. Perry,

United States District Judge.

Dated: September 16, 1958,
Chicago, Illinois.

IN THE UNITED STATES DISTRICT COURT.

Northern District of Illinois

Eastern Division

Chicago and North Western Rail-
way Company, a corporation,

Plaintiff,
vs.

The Order of Railroad Telegra-
phers, et al.,

Defendants.

Civil Action
No. 58 C 1538
Equitable Relief
Demanded

SECOND AMENDED NOTICE OF APPEAL.

Notice is hereby given that The Order of Railroad Telegraphers, a voluntary association; James W. Whitehouse, Vice President of said association; Robert C. Williamson, General Chairman of said association; J. M. Jenks, General Secretary and Treasurer of said association; Renel C. Robertson, Thorwald Larsen and Lawrence W. Nelson, being all of the defendants in this cause, do hereby again amend the Notice of Appeal filed September 9, 1958 and hereby appeal to the United States Court of Appeals for the Seventh Circuit from the following orders of the United States District Court:

1. The restraining order of August 20, 1958, and the orders of August 22, 1958, August 27, 1958 and September 5, 1958, extending the order of August 20, 1958.

2. That portion of the Decree entered September 8, 1958 restraining the defendants from striking until midnight, September 19, 1958.

3. The order of September 16, 1958 entered pursuant to Rule 62(c) of the Federal Rules of Civil Procedure restraining any strike pending determination on appeal.

Alex Elson and Lester P. Schoene,
Attorneys for Defendants.

By Alex Elson,
One of Attorneys for Defendants.

Dated: September 16, 1958.

Alex Elson,
11 S. LaSalle St.
Chicago, Ill.

Of Counsel:

Schoene and Kramer,
1625—K Street, N. W.,
Washington 6, D. C.

United States of America, } ss.
Northern District of Illinois. }

* * * (Caption—58-C-1538) * *

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 16, 1958 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Messrs. Carl McGowan

Fred O. Steadry

Edgar Vanneman, Jr.

R. W. Russell

Attorneys for Plaintiff

c/o Law Department

Chicago and North Western Ry. Co.

400 W. Madison Street

Chicago 6, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of September, 1958.

Roy H. Johnson,

Clerk.

By Sarah Brown,

Deputy Clerk.

(Seal)

United States of America, } ss:
Northern District of Illinois. }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the Record on Appeal in the case of Chicago and North Western Railway Company Plaintiff-Appellee vs. The Order of Railroad Telegraphers, et al. No: 58 C 1538 Defendants-Appellants as follows:

Verified Complaint—filed August 20, 1958

Temporary Restraining Order entered August 20, 1958

Order entered on August 22, 1958 continuing the Temporary Restraining Order entered on August 20, 1958, until August 28, 1958

Amendment to Complaint—filed August 22, 1958 (a copy certified to by Judge Perry to be correct copy of original)

Answer to Complaint—filed August 25, 1958

Answer to Amendment to Complaint—filed August 25, 1958

Order entered August 27, 1958 continuing the temporary restraining order entered on August 20, 1958 until September 6, 1958

Findings of Fact and Conclusions of Law entered on September 8, 1958

Decree entered September 8, 1958 restraining defendants from striking until September 19, 1958 at midnight

Order entered on September 8, 1958 granting an injunction pending appeal under Rule 62(c)

Order entered on September 5, 1958 continuing restraining order

Notice of Appeal filed by defendants on September 8, 1958

Amended Notice of Appeal—filed by defendants on September 10, 1958

Clerk's Certificate.

Appellants' designation of portions of Record on Appeal, pursuant to Rule 12(g) of the Rules of the United States Court of Appeals for the Seventh Circuit—filed September 10, 1958

Motion of defendants to dismiss appeal from order of September 8, 1958 granting injunction under Rule 62(c) and to vacate said injunction order—filed September 12, 1958

Order entered September 12, 1958, vacating order entered on September 8, 1958 enjoining defendants under Rule 62(c), and dismissing that portion of defendants' appeal relating to the aforesaid Rule 62(c) injunction order, without prejudice to the appeal taken from the other orders appealed from in the Amended Notice of Appeal filed September 10, 1958

Notice of Appeal filed September 16, 1958 by plaintiff
Order entered September 16, 1958 that injunction issue under Rule 62(c), etc.

Second Amended Notice of Appeal filed by defendants on September 16, 1958

Appellants' additional designation of portions of record on appeal pursuant to Rule 12(g)—filed September 18, 1958

filed and entered among the records of the Said Court in my office on the dates indicated.

In testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of September, 1958.

Roy H. Johnson,

Clerk.

By Sarah Brown,

Deputy Clerk.

(Seal)

[fol. 377]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1958—JANUARY SESSION, 1959.

No. 12435

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
a corporation, Plaintiff-Appellee,

v.

THE ORDER OF RAILROAD TELEGRAPHERS, a voluntary
association, et al., Defendants-Appellants.

No. 12455

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
a corporation, Plaintiff-Appellant,

v.

THE ORDER OF RAILROAD TELEGRAPHERS, a voluntary
association, et al., Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.

OPINION—March 13, 1959

Before DUFFY, Chief Judge, and PARKINSON and KNOCH,
Circuit Judges.

KNOCH, *Circuit Judge.* These two appeals arise out of the same proceeding below, and, by agreement of the parties, were heard together by this Court. In No. 12435, the defendants-appellants, hereinafter referred to as the "Union," have appealed from an order of the District [fol. 378] Court entered on August 20, 1958, restraining the Union from striking; the orders of August 22 and 27, 1958,

extending the restraining order of August 20, 1958; that portion of the decree entered September 8, 1958, restraining the defendants from striking until midnight, September 19, 1958; and the order of September 16, 1958, entered pursuant to Rule 62 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., restraining any strike pending appeal. In No. 12455, the plaintiff-appellant, hereinafter referred to as "North Western," has appealed from that portion of the September 8, 1958 decree denying any injunctive relief beyond September 19, 1958, and dismissing its complaint.

The contested issues are set forth with many variations by the parties. However, our decision that North Western is entitled to a permanent injunction is dispositive of the entire matter. The controlling issue may be stated simply as follows:

May the employees of North Western, represented by the Union, lawfully strike to enforce a demand that positions held by such employees on December 3, 1957, shall be abolished only by agreement between North Western and the Union?

The facts are that North Western's stations, laid out a short distance apart many years ago to accommodate the horse-drawn vehicles of that day, have been so affected by the changes in transportation, including the hard roads, telephone and automobile, that many station agents were receiving a full day's pay for twelve to thirty minutes' work, although North Western was in serious need of funds to raise its service and equipment to a level at which it could compete not only with other railroads but with all other modern forms of transportation.

As a part of a modernization program to meet competition, North Western formulated its "Central Agency Plan," under which the service area of certain station agents was extended to include a neighboring station or stations without any curtailment of service to shippers.

North Western filed petitions for authority to effectuate the Central Agency Plan with the public utilities commissions of South Dakota, Iowa, Minnesota and Wisconsin. In

[fol.379] South Dakota, the Public Utilities Commission held hearings at various points throughout the State over a period of about two months. The Union appeared in the proceedings to protest the granting of the authority sought; presented evidence; participated in filing briefs with, and in oral argument before, the Commission. The Commission found that the Central Agency Plan was required in the public interest, granted North Western the authority sought, and directed the Plan be made effective forthwith. The same procedure was followed in Iowa with a similar authorization granted by the Iowa State Commerce Commission. Hearings have been held before the Minnesota and Wisconsin Commissions, but determinations are still awaited.

In the Commission proceedings, the Union took the position that the Central Agency Plan could not be put into effect without agreement of the Union under the existing collective bargaining contracts. However, a few weeks after North Western filed its first petition in South Dakota, the Union sent North Western letters under Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 151, *et seq.*) requesting that the existing collective bargaining agreements be amended by adding the following provision:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization."

North Western informed the Union that it did not consider this proposal for a change in the contracts to be legally within the scope of Sec. 6 of the Railway Labor Act. Thereafter the Union invoked mediation under the Act. The National Mediation Board began mediation proceedings. The Board, on May 27, 1958, requested the parties to arbitrate. On May 28, 1958, the Union declined, and, on June 12, 1958, North Western declined. On June 16, 1958, the Board closed its files.

The Board Chairman and Chief Executive Officer of North Western indicated a willingness to discuss means of cushioning the economic impact of abolition of positions, as had been undertaken in a supplemental Unemployment

Benefits Agreement with most of the other non-operating railroad unions who had been affected by reductions in force. North Western's Chairman expressed a continuing [fol. 380] willingness to discuss that type of agreement, including such matters as severance pay, transition of employees from non-productive to productive employment and the like. The Union's President expressed an opinion that the Agreement was inadequate, but offered no proposals for alteration in its terms. The Union offered no modification or reduction in its proposed change to the existing contract.

North Western received notice, on August 14, 1958, of a threatened strike by the Union from the National Mediation Board. The Board offered its mediation services in the dispute. Both parties accepted and the case was docketed.

On August 18, 1958, the Union issued a strike call to its members for 6 o'clock A.M. on August 21, 1958, which read in part:

"The Issues.

"On July 10, 1957, we submitted to the membership on the Chicago & North Western System a strike ballot seeking the views of the membership as to whether a strike should be authorized if necessary to secure a satisfactory settlement of the dispute arising from our proposal to add to existing agreements the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization."

"In the circular we summarized the circumstances giving rise to the urgent need for such a rule. We pointed out the general onslaught of this Carrier on the employment of the people we represent, and particularly the system-wide, wholesale elimination of agency positions and enlargement of assignments of the remaining agents. We recited the brutal conduct of the carrier in South Dakota in abolishing 53 positions and enlarging the assignments of 16 others, all in one day, before we even had notice of the Order of the South Dakota Commission under which the Carrier purported to act. We also told you of our strenu-

ous, patient, but futile efforts to correct the situation under the Railway Labor Act and in the Courts.

"The need for the proposed rule has again been tragically demonstrated in the last few days. What [fol. 381] happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged.

"The vote on the strike ballot was almost unanimous in favor of a strike. The time has come to act in accordance with that vote."

On August 19, 1958, Mediator Wallace Rupp came to North Western. He talked with North Western's Director of Personnel. The latter suggested that, without prejudice to North Western's position regarding the illegality of the proposed contract change, ". . . there was a possibility of settling the entire question involving the proposed rule on the railroad by working out an arrangement for limiting the number of lay-offs per year to an agreed upon percentage of the total number of jobs of the [Union], over and above the reduction in the number of such employees by attrition." Rupp left to talk with representatives of the Union with the understanding that if they were interested in the Director's proposal, he would call him the following morning. Rupp did not call. The Board closed its file on August 20, 1958, stating its services continued available if desired.

North Western then filed this action in injunction. The District Court issued a temporary restraining order which was continued through the hearing on the merits. On September 8, 1958, after hearing the evidence and arguments of counsel, the District Court filed findings of fact and conclusions of law, and entered a decree enjoining the Union from striking until midnight, September 19, 1958, and otherwise dismissing the complaint. The District Court then entered an order restraining the Union from striking pending appeal. These appeals followed.

The Norris-LaGuardia Act, (29 U. S. C. A. Sec. 101, *et seq.*) prohibits any court of the United States from issuing an injunction in any case involving a "labor dispute," and in Sec. 113(c), the term "labor dispute" is defined as

"any controversy concerning terms or conditions of employment."

The Railway Labor Act (45 U. S. C. A. Sec. 151, *et seq.*) provides for a thirty-day written notice (Sec. 156) to be given by any party who wishes to change an agreement [fol. 382] "affecting rates of pay, rules, or working conditions." This is commonly known as the "Section 6 Notice." Thus where a Section 6 Notice dealing with one of the enumerated subjects is given by a union to a carrier, a "labor dispute" within the meaning of the Norris-LaGuardia Act has arisen. Conversely; where the Section 6 Notice does not pertain to "rates of pay, rules, or working conditions," there is no "labor dispute," and the provisions of the Norris-LaGuardia Act with reference to injunctions are not applicable.

It is perhaps true that any demand a union might make, no matter how frivolous or unlawful, could, by some stretch of the imagination, be contended to affect "rates of pay, rules, or working conditions." However, the Supreme Court has pointed out that not all demands, by either labor or management, are within the scope of the Railway Labor Act, and hence the insistence upon their inclusion within a labor agreement does not give rise to a "labor dispute." Or, as it is more commonly put, the demand is not within the scope of mandatory bargaining. *Labor Board v. Borg-Warner Corp.*, 1957, 356 U.S. 342, 349. Accordingly, the issue here is whether the Union's demand falls within the scope of mandatory bargaining. If it does not, the injunction may and should issue.

Certainly the Railway Labor Act does not divest a carrier of the right to manage and control the administrative functions of its business enterprise and conduct its business operations without exercise of a veto power by the Union. Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. The Union is thus attempting to attain, through the collective bargaining processes of the Railway Labor Act, that which would prohibit North Western from complying with the orders of the South Dakota Public Utilities Commission and the Iowa State Commerce Commission.

In short, this is an attempt by the Union to arrogate to itself the prerogatives that have been traditionally and rightfully management's, while, at the same time, assuming none of the corresponding burdens and responsibilities.

North Western must, as the record clearly shows, adapt itself to ever-changing technological developments, and [fol. 383] must be ready, at all times, to meet the demands of competition in all fields of transportation by every legitimate means.

It appears clear that the effect of the Union's proposal, if accepted, would place in its hands the power to prevent any undertaking by North Western to meet competition by modernizing its operations in the light of technological development, and fulfilling its obligation of operating efficiently and economically for the benefit of itself, its employees, and the public. Ultimately the Union could even bring about a situation where the railroad itself might be forced out of business or so crippled financially that all employees, including the Union's members, would suffer. This contract proposal, if accepted, would enable the Union to control the pace of North Western's compliance with the Commission orders aforesaid. The Union points to existing contracts in the railroad industry relating to stabilization of employment: These are described as dealing with severance allowance, supplementary unemployment compensation benefits and guaranteed employment. They do not vest indefinite retroactive veto power over abolition of positions and are expressly limited to prospective periods of short duration. The existing agreement between North Western and the Union states no expiration date and may be changed only by mutual agreement. North Western asserts that it ". . . remains ready to negotiate on any proposals comprehending financial benefits for job displacement or for otherwise cushioning the impact of the Central Agency Plan. It cannot agree to recognize the propriety of a separate demand which would displace Congress, the Interstate Commerce Commission, state regulatory commissions, and management, from the determination of the positions which must be maintained by the carrier from the standpoint of efficiency and economy."

In any event, the fact that other carriers may have sub-

mitted to unlawful demands does not change the character of such demands. A carrier may not escape its obligations by bargaining them away. The Commission orders may not be circumvented by a contract entered into by a carrier and a union under threat of strike.

In *Brotherhood of Railroad Trainmen, et al. v. Howard, et al.*, 1952, 343 U.S. 768, where the Supreme Court found [fol. 384] that the dispute, as here, involved the validity of the contract, the Court concluded that the District Court had jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-LaGuardia Act. (p. 774).

In that case, by threat of strike, an exclusively "white" union secured a contract with a railway company not to permit negroes (hired as "train porters" because not eligible to join the contracting union) to perform duties of brakemen, as a result of which the railway company took steps to discharge the negro "train porters" who had been performing the duties of brakemen in order to replace them with members of the contracting "white" union.

To the same effect were *Graham, et al. v. Brotherhood of Locomotive Firemen and Enginemen*, 1949, 338 U.S. 232; *Steele v. Louisville and Nashville Railroad Co.*, 1944, 323 U.S. 192; and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 1944, 323 U.S. 210.

The Union attempts to distinguish these cases as involving a demand to bargain a patently immoral and unlawful contract provision. The provision here proposed is characterized by the Union as relating to stabilization of employment—a lawful purpose. However, "stabilization of employment" is a broad term which may, with equal justice, be applied to the aims of the unions concerned in the above cited cases. We see no material difference between the *Howard* case and the case before us.

The proposed contract change in the case before us represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations. It is perhaps significant that on oral argument, counsel for the Union expressed the opinion that a demand for veto over discontinuing trains, while less reasonable than

that proposed here, would constitute a bargainable issue under the Railway Labor Act.

The Court of Appeals for the Sixth Circuit was faced with an issue similar to the one before this Court in *Brotherhood of Railroad Trainmen, et al. v. The New York Central Railroad Co.*, 6 Cir., 1957, 246 F. 2d 114, cert. den. 355 U.S. 877. There the union threatened to strike if the [fol. 385] New York Central Railroad closed its Toledo, Ohio yards. The Court held that no labor dispute existed within the meaning of the Norris-LaGuardia Act and that the injunction should issue. While it is true that the union in that case gave no Section 6 notice, we fail to see how such failure distinguishes the rationale of that case from the one here. We agree with the Sixth Circuit, which held (p. 122):

"A railroad strike involving a controversy which does not constitute a labor dispute, may be, and properly is, enjoined upon a showing that it will interfere with interstate commerce and result in irreparable injury to the public and to the railroad."

We, therefore, hold that such a demand as here made by the Union is completely outside the ambit of "rates of pay, rules and working conditions," as those words are used in the Railway Labor Act, *In re Chicago North Shore and M. R. Co.*, 7 Cir., 1945, 147 F. 2d 723, 727, cert. den. 325 U.S. 852; and hence is not within the scope of mandatory bargaining. Therefore, the terms of the Norris-LaGuardia Act are here inapplicable.

The District Court's finding that the proposed contract change related to "rates of pay, rules and working conditions," and was thus a bargainable issue under the Railway Labor Act, is clearly erroneous.

The judgment of the District Court denying injunctive relief beyond September 19, 1958, and dismissing the complaint is reversed and cause remanded for entry of a permanent injunction as prayed by North Western.

[fol. 387]

**IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Before Hon. F. Ryan Duffy, Chief Judge; Hon. W. Lynnparkinson, Circuit Judge; Hon. Win G. Knoch, Circuit Judge.

No. 12435

**CHICAGO AND NORTH WESTERN RAILWAY Co., a corp.,
Plaintiff-Appellee,**

vs.

**THE ORDER OF RAILROAD TELEGRAPHERS, a voluntary assoc.,
et al., Defendants-Appellants.**

No. 12455

**CHICAGO AND NORTH WESTERN RAILWAY Co., a corp.,
Plaintiff-Appellant,**

vs.

ORDER OF RAILROAD TELEGRAPHERS, etc., et al.

**Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.**

JUDGMENT—March 13, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court, denying injunctive relief beyond September 19, 1958, and dismiss the complaint be, and the same is hereby, Reversed, and that

this cause be, and the same is hereby Remanded for entry of a permanent injunction as prayed by Chicago & Northwestern Railway Co., in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs on these appeals be taxed against the Order of Railroad Telegraphers, et al.

[fol. 389] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 391]

SUPREME COURT OF THE UNITED STATES

No. 100, October Term, 1959

THE ORDER OF RAILROAD TELEGRAPHERS, etc., et al.,
Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
a corporation.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT. U. S.

Office-Supreme Court, U.S.

F I L E D

JUN 8 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~██████████~~

100

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

ALEX ELSON,
LESTER P. SCHOENE,
1625 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Petitioners.

BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable, the Chief Justice of the United States
and the Justices of the Supreme Court of the United
States:*

The petitioners, The Order of Railroad Telegraphers,
et al. (hereinafter "the Union"), respectfully show:

JURISDICTION.

The jurisdiction of this Court to entertain the petition
for a writ of certiorari is based on 28 U. S. C. § 1254(1).

The judgment of the Court of Appeals for the Seventh
Circuit was entered on 13 March 1959.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, per Perry, J., is not reported. It may be found in the Appendix at pp. 165-71. The findings of fact and conclusions of law of the District Court appear in the Appendix at pp. 351-358. The opinion of the Court of Appeals is reported at 264 F. 2d 254. It also is reproduced in the Appendix filed with this petition.

STATUTES AND RULES INVOLVED.

**Norris-LaGuardia Act, §§ 1, 4, 7, 8 and 13(c); 29 U. S. C.
§§ 101, 104, 107, 108 and 113(c):**

Section 1. Norris-LaGuardia Act.

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U. S. C. § 101.

Section 4. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(e) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title." 29 U. S. C. § 104.

Section 7. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association,

or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any

injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity." 29 U. S. C. § 107.

Section 8 of the Norris-LaGuardia Act.

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

Section 13(c), Norris-LaGuardia Act.

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113(c).

**Railway Labor Act, §§ 2, First, 5, First and 6; 45 U. S. C.
§§ 152, First, 155, First and 156:**

Section 2, First, of the Railway Labor Act.

"First: It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. § 152, First.

Section 5, First, of the Railway Labor Act:

"The parties, or either party, to a dispute between an employee or group of employees, and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." 45 U. S. C. § 155, First.

Section 6 of the Railway Labor Act.

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board," 45 U. S. C. § 156.

Federal Rules of Civil Procedure, Rule 62(c):

"Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon

such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

STATEMENT.

This case presents the question whether the laws of the United States, implemented by the injunctive powers of the federal courts, preclude railway labor unions from securing a voice through collective bargaining in the determination of how the fruits of increased productivity and the consequent burdens of technological unemployment are to be distributed between employers and employees. It arose out of the following facts.

On December 23, 1957, the Union, the certified collective bargaining agent pursuant to the Railway Labor Act for the station, telegraph, and tower employees of the Railroad (Finding 2, App. 351), served a notice pursuant to § 6 of the Railway Labor Act, 45 U. C. S. § 156, to amend the agreement between them by adding the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." (Finding 3, App. 352.)

The reason for the proposal was stated by the Union's President as follows:

"* * * there has been a change in the management of the Chicago and North Western System. There had been a general slaughter of positions. I mean of jobs. There had also been a consolidation between Omaha and the North Western. Our organization had lost a number of jobs already.

"The incidents or occurrences that I have described extend to and affect all classes of employees represented by the Order of Railroad Telegraphers. Based on our membership survey, approximately one hundred positions had been eliminated other than in the station agent positions." (App. 120.)

The Railroad refused to confer on the subject of the § 6 notice. (Finding 4, App. 352.) The Railroad's intransigent position on this was revealed in the testimony at the trial by Mr. Heineman, Chairman of the Railroad:

"You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified nor in my opinion can it be." (App. 104.)

After the Railroad's refusal to discuss the proposed rule, the Union notified the Railroad that it was processing the § 6 notice pursuant to the terms of the Railway Labor Act. (Finding 5, App. 352-53.) On February 5, 1958, the Union made application for the mediation services of the National Mediation Board. (Finding 6, App. 353.) The Board docketed the case as Case No. A-5696. (Finding 7, App. 353.) But the mediator appointed by the Board was unable to persuade the Railroad to discuss the merits of the proposed rule and, on May 27, 1958, informed the parties that he had been unsuccessful in his efforts and suggested arbitration in accordance with the provisions of the Railway Labor Act. Both parties declined arbitration. (Finding 8, App. 353.) Mediation was terminated on June 16, 1958, and the file was closed on July 16, 1958. (App. 50-51, 333.)

Under date of July 10, 1958, the Union sought the views

of its membership on the question whether a strike should be authorized if necessary to seek a satisfactory settlement of the dispute arising from the proposal of the Union. (Finding 10, App. 354.) The vote in favor of the strike was almost unanimous. (*Ibid.*) No strike action was taken by the Union until after the thirty-day period following the termination of mediation had expired. On August 18, 1958, a strike call was issued to commence August 21, 1958. (Finding 11, App. 354.) On the day the strike call was issued, the Mediation Board proffered its services on an emergency basis. (Finding 12, App. 354-55.) Both sides accepted the proffer. (*Ibid.*) Case No. E-175, as it was docketed, proved equally futile and was closed by the Board on August 20th, 1958. (*Ibid.*)

After the service of the § 6 notice, the Railroad pressed proceedings before the Iowa and South Dakota regulatory commissions for permission to adopt its Central Agency Plan which called for the abolition of numerous station agent positions now held by members of the Union. Both commissions granted permission to institute the Railroad's plan for job abolition.*

On August 20th, the Railroad instituted an action in the United States District Court for the Northern District of Illinois, asserting that it was entitled to an injunction against the proposed strike because the strike was illegal under the laws of the United States. (App. 4.) Since no diversity of citizenship exists between the parties, the Railroad's right to relief, if it has any, must depend on the fact that the laws of the United States give a right to injunction under the circumstances of this case.

On the day that the complaint was filed, the District

* The order of the South Dakota Commission, when first issued, purported to be mandatory in character. On denial of application for rehearing the Commission disclaimed any intention to interfere with the Railroad's obligations under the Railway Labor Act or its labor agreements. (App. 341-42.)

Court issued a preliminary restraining order enjoining defendants from striking until August 25, 1958. (App. 14-15.) From time to time this order was extended. (App. 15, 73-74, 74.) The District Court heard the evidence and arguments on the questions of a temporary and permanent injunction on August 25-27, 1958. (App. 1.) After the filing of briefs and further argument, the court rendered its opinion on September 5 and entered its findings of fact and conclusions of law and its decree on September 8, 1958. (App. 165-71; 351-58; 359.) The decree enjoined the strike until September 19, 1958, on the ground that this was the expiration of thirty days following the second Mediation Board effort. (Conclusion 5, App. 358.) In all other respects, it denied the relief sought by the Railroad and dismissed the complaint. On September 16, 1958, however, the District Court, on application of the Railroad, entered an order enjoining petitioners from striking until the disposition of the Railroad's appeal. (App. 371.) Both the Railroad and the Union appealed from the decree of the District Court. (App. 366; 360, 363, 372-73.)

Pending appeal in the Court of Appeals, the petitioners filed a petition for mandamus and a petition for certiorari before judgment in this Court, on the grounds, *inter alia*, that the Norris-LaGuardia Act prevented the issuance of the injunction pending appeal and that the Railway Labor Act does not require a second thirty-day moratorium on strikes. Both petitions were denied. 358 U. S. 916, 920 (1958).

On March 13, 1959, the Court of Appeals for the Seventh Circuit decided the appeals before it in this case. It held that the issue raised by the § 6 notice was not one "relating to rates of pay, rules and working conditions," thereby upsetting the trial court's finding as "'clearly erroneous.'" 264 F. 2d at 260. From this false premise it reached a false conclusion, a conclusion which would be in error even

if the premise had been valid: that because the issue "is not within the scope of mandatory bargaining . . . the terms of the Norris-LaGuardia Act are here inapplicable." (*Ibid.*) It is from the judgment based on this opinion that the petition for certiorari is taken.

QUESTIONS PRESENTED.

1. Whether the "laws of the United States", and more specifically the Railway Labor Act and the Interstate Commerce Act, make it illegal for a railway labor union to secure a voice through collective bargaining in the determination of how the fruits of increased productivity and the burdens of consequent technological unemployment are to be distributed between employers and employees, and warrant the interposition of the injunctive processes of the federal courts against a strike for such purposes.
2. Whether the Court of Appeals erred in holding that the contest between the Union and the Railroad, over the Union's demand to participate in the decision of what jobs which its members hold may be abolished, was not a "labor dispute" within the meaning of the Norris-LaGuardia Act.
3. Whether the Court of Appeals erred in holding that the contract change proposed by the Union did not relate to "rates of pay, rules and working conditions" as that phrase is used in the Railway Labor Act.
4. Whether the Court of Appeals erred in holding that the Norris-LaGuardia Act does not prohibit the issuance of a strike injunction where the employer has refused to comply with the terms of the Railway Labor Act.
5. Whether the Court of Appeals erred in holding that the right of the Union to demand changes in a contract, which changes related to "rates of pay, rules and working conditions", was limited by action of State regulatory commissions.

6. Whether the District Court had jurisdiction to entertain this suit in the absence of diversity of citizenship and in the absence of any question "arising under the Constitution or laws of the United States."

7. Whether the Court of Appeals erred in not reversing the District Court's holding that Rule 62(c) of the Federal Rules of Civil Procedure authorizes a federal court to issue an injunction against a strike despite the Norris-LaGuardia Act's prohibition against such an injunction.

8. Whether the Court of Appeals erred in not reversing the District Court's holding that the Railway Labor Act withdraws the right to strike for a second thirty day period following the failure of emergency mediation services.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has erroneously decided a question of federal law which has not been, but should be, decided by this Court, namely, whether federal law makes it illegal for a union to strike in order to compel an employer to bargain on an issue of job security. In so doing, the Court of Appeals has plainly misconstrued the Norris-LaGuardia Act and the Railway Labor Act in their application to issues of great importance not only to the parties but to the railroad unions and the railroads generally and to labor unions and employers generally. The practical effect of the decision below is to impede, if not nullify, collective bargaining of contract changes in the railroad industry. The contention of non-bargainability would become routine as to virtually all contract proposals other than those concerned with wages. Without a body of law establishing what is or is not bargainable, intervention of the federal courts by injunction would likewise be sought as a routine matter. The end result would be a breakdown of the administration of the Rail-

way Labor Act and a destruction of the peaceful processes developed thereunder.

2. The Court of Appeals has decided questions of federal law in a way which conflicts with the decisions of this Court in *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958); and *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

3. The Court of Appeals has erroneously sanctioned the District Court's improper exercise of jurisdiction over a suit which was based neither on diversity of citizenship nor on a question "arising under the Constitution or laws of the United States." In so doing, it erroneously decided a question which was specifically left open by this Court in *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 55 (1944).

4. The Court of Appeals has disposed of an important question of federal law which has not been, but should be, settled by this Court: namely, whether a federal court may, notwithstanding the provisions of the Norris-LaGuardia Act, enjoin a strike pending appeal from a final decree denying injunctive relief.

5. The Court of Appeals has disposed of an important question of federal law which has not been, but should be, settled by this Court: namely, whether the Railway Labor Act makes a strike unlawful for a period of thirty days following unsuccessful efforts at mediation by the National Mediation Board, and in particular whether a second successive period of thirty days during which a strike is unlawful follows the unsuccessful termination of further emergency efforts at mediation.

I.

The Court of Appeals Has Rejected Long-Established Principles of Labor Law Formulated by Congress and This Court.

This case presents a revival of the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed. It is hardly necessary to remind this Court of the importance of the national policy expressed in the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.* As early as 1914 Congress sought through the Clayton Act (29 U. S. C. § 52) to curb those abuses, which nevertheless continued. "In large part, dissatisfaction and resentment are caused * * * by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction', characterized by the consequences of a criminal proceeding without its safeguards, has been challenged." Frankfurter & Greene, *The Labor Injunction* 200 (1930). In the words of the late Mr. Justice Brandeis, the labor injunction was not ordinarily sought "to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men." *Truax v. Corrigan*, 257 U. S. 312, 354, 368 (1921) (dissenting opinion). In 1932 Congress, in the Norris-LaGuardia Act, reaffirmed its policy against such abuse of the judicial process, this time with an effectiveness which has endured for a generation. Now, however, the Court

of Appeals for the Seventh Circuit, reading the Act with a narrow and hostile interpretation reminiscent of the decisions which emasculated the Clayton Act, declares that the federal courts must in a large and growing area of industrial conflict resume the role from which they were withdrawn by Congress, and must once again "take up the shock of our industrial warfare." Pepper, *Injunctions in Labor Disputes*, 49 A. B. A. Rep. 174, 179 (1924).

The Norris-LaGuardia Act provides: "No court of the United States *** shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute ***" (29 U. S. C. § 101), with exceptions not material here (*id.*, § 107). The definition of the term "labor dispute" is comprehensively broad: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment ***" (*id.*, § 113(c)). The dispute in this case arose when the Union, pursuant to the Railway Labor Act, gave notice of a proposal to change the terms of an existing collective bargaining agreement. The proposed change, if agreed to, would have required collective bargaining with respect to the abolition or discontinuance of existing positions. The dispute arose when the Railroad refused to bargain concerning the proposed change. It is evident that the proposed change in the agreement related to: (1) the length, or duration, of employment, and (2) the security of job tenure. Yet the Court of Appeals has held that the dispute was not one "concerning terms or conditions of employment."

The process of reasoning by which such a conclusion is reached must be a tortured one; and, indeed, the reasoning of the Court of Appeals is such as to make orderly

discussion difficult. The opinion of the court is a tangled skein of errors and prejudices. It reaches its startling conclusion by adopting a conception of the prerogatives of management as baronial as if collective bargaining had never been recognized; by repeatedly stigmatizing the Union's proposals to bargain as demands for a "veto" power; by treating the question whether the Norris-LaGuardia Act deprives the court of jurisdiction to issue an injunction as identical with the question whether the dispute was one within the terms of the Railway Labor Act; and by importing irrelevant and confusing concepts from the Labor Management Relations Act.

It is necessary to deal at the outset with some of these distracting matters. The entire course of the court's opinion is affected by the identification of the issue under the Norris-LaGuardia Act with that under the Railway Labor Act:

"Thus where a Section 6 Notice dealing with one of the enumerated subjects is given by a union to a carrier, a 'labor dispute' within the meaning of the Norris-LaGuardia Act has arisen. Conversely, where the Section 6 Notice does not pertain to 'rates of pay, rules, or working conditions', there is no 'labor dispute', and the provisions of the Norris-LaGuardia Act with reference to injunctions are not applicable." 264 F. 2d at 258.

The present case concerns a labor dispute, relating to "terms or conditions of employment" within the Norris-LaGuardia Act. It is also a dispute pertaining to "rates of pay, rules, or working conditions", within the Railway Labor Act. It is not true, however, that coverage by the Railway Labor Act is a prerequisite to the applicability of Norris-LaGuardia's proscription of the injunctive remedy. We do not believe that there is a significant difference between the coverage of the two acts, except as this Court has established a difference in *Trainmen v. Chicago River*

& Indiana R. Co., 353 U. S. 30, 40 (1957). By assuming identity of coverage, however, and by gratuitously grafting upon the Railway Labor Act a concept of disputes not within the area in which the parties are under the statutory duty to bargain, the Court of Appeals paved the way for its conclusion that the dispute involved here was not within the coverage of either act.

The concept of a dispute not within the scope of the duty to bargain was borrowed from the Labor Management Relations Act. For its proposition that the dispute here was "not within the scope of mandatory bargaining", and hence not within the provisions of Norris-LaGuardia, the court cited *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958). There an employer insisted, as a condition of entering into a collective-bargaining agreement, upon the inclusion of (1) a "ballot" clause calling for a pre-strike secret vote of employees, union and nonunion, and (2) a "recognition" clause which excluded, as a party to the contract, the international union which was the certified representative. The Board held that both these clauses related to matters outside the scope of mandatory collective bargaining as defined in section 8(d) of the Labor Management Relations Act (referring to "wages, hours, and other terms and conditions of employment"), and that the employer's insistence upon their inclusion as the price of agreement on any contract was an unfair labor practice. This Court affirmed, four Justices disagreeing as to the "ballot" clause.

As this Court has had occasion to note, "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act . . ." *Trainmen v. Chicago, River & Indiana R. Co.*, 353 U. S. 30, 31-32, n. 2 (1957).

The term "unfair labor practice" is not used in the Railway Labor Act. That Act establishes no such agency as the National Labor Relations Board, empowered to determine what constitutes an unfair labor practice and hence, under this Court's decision in the *Borg-Warner* case, to exercise a degree of control over the issues which are thought to be appropriate subjects for bargaining. By its decision below the Court of Appeals has in effect read a provision concerning unfair labor practices into the Railway Labor Act, and has set itself up as the agency to determine what are and what are not appropriate subjects of bargaining. In so doing, it has announced that its own determinations of that question are controlling with respect to the scope of the protection which the Norris-LaGuardia Act provides against government by injunction.

The *Borg-Warner* case sharply divided the members of this Court. Referring to the phrase "other terms and conditions of employment," Mr. Justice Harlan said in his separate opinion: "The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation." *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 351, 353 (1958). In his view the Board "was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies" of the Wagner and Taft-Hartley Acts. We are not concerned here with the correctness of that decision. We are vitally concerned, however, with the fact that this Court's decision of a close question under the Labor Management Relations Act has been misapplied to a dispute under the Railway Labor Act with no justification whatever and in such a way as to aggravate the unfortunate consequences which Mr. Justice Harlan anticipated.

The Court of Appeals has misinterpreted the *Borg-Warner* case in such a way as to produce consequences in

the railway labor field which were of a certainty not intended by those who joined in the majority opinion in *Borg-Warner* in the more general field of labor relations to which the decision relates. This Court held only that the matters covered by the "ballot" and "recognition" clauses were not within the scope of the duty to bargain imposed by the Labor Management Relations Act; it did not hold that bargaining with respect to those matters was forbidden. "As to [matters not within the scope of mandatory bargaining], however, each party is free to bargain or not to bargain . . ." (356 U. S. at 349.) "Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions." (*Ibid.*) The fault of the employer was a narrowly defined one: he might permissibly propose these clauses and bargain over them; his sole fault was in refusing to agree to any contract not containing them. It was this refusal which was construed as a refusal to bargain on matters within the scope of mandatory bargaining. Without such a refusal, the employer would have been free to back his bargaining over the same clauses with his economic power. Without it, if a strike had resulted from failure to agree upon one or the other of the clauses the Norris-LaGuardia Act would have prohibited injunction; there is not the slightest intimation in *Borg-Warner* to the contrary.

Yet the Court of Appeals holds that the mere proposal by the Union of a clause relating to job tenure, followed by recourse to its collective bargaining position upon the refusal of the Railroad to bargain on the question, deprives the Union of the protection of the Norris-LaGuardia Act. Let us assume for the moment—of course without conceding—(1) that by implication the Railway Labor Act contains some analogue of the Labor Management Relations Act's concept of "unfair labor practices," of which a refusal to bargain on matters within the scope of "mandatory col-

lective bargaining" is one; and (2) that the proposal relating to discontinuance of positions contained in the Union's Section 6 notice was not within the range of subjects with respect to which bargaining was mandatory. The Union was nevertheless free to make the proposal. There was in existence a collective bargaining agreement between the parties unquestionably relating to matters within the scope of mandatory bargaining, none of which were involved in the proposal. The Union was not in the position of refusing to bargain on "mandatory" issues unless and until agreement should be reached on this "non-mandatory" one; only the issue of job abolition was involved. On the hypotheses stated, each party was free to bargain on the proposal or not, and to enforce its position by recourse to economic resources—in the employment of which the Union would be protected against injunction by the Norris-LaGuardia Act. Yet the Court of Appeals says:

"Accordingly, the issue here is whether the Union's demand falls within the scope of mandatory bargaining. If it does not, the injunction may and should issue." 264 F. 2d at 258.

Much of the error and confusion of the opinion is reflected in this curt and elliptical passage. In it the Court of Appeals decrees, in effect; that by making a proposal which it was perfectly free to make even under the *Borg-Warner* doctrine, and in resorting to the right to strike in order to induce the Railroad to bargain over the proposal, the Union was somehow guilty of an "unfair labor practice" (not described by the Railway Labor Act), and that the penalty—not prescribed by any law—for this practice is exclusion from the protection of Norris-LaGuardia.

The most alarming and least excusable aspect of this error is the presumptuous judicial curtailment of the national policy stated in the Norris-LaGuardia Act—a curtailment which finds not a trace of justification in the *Borg-*

Warner case. That dealt only with unfair labor practice under the Labor Management Relations Act and did not involve injunctions or the Norris-LaGuardia Act in any way. Moreover, the Labor Management Relations Act's concept of "unfair labor practice" and the concomitant distinction between "mandatory" and "permissible" subjects of bargaining have no place in the different plan devised by Congress to regulate railway labor disputes. Under the Railway Labor Act it is "the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle *all disputes*, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce . . ." Section 2, First. (Emphasis supplied.) Such comprehensive language leaves no room for a sector in which the parties are "free to bargain or not to bargain." 356 U. S. at 349. Either the subject of the proposal is one on which agreement would be unlawful, or it is one with respect to which bargaining is mandatory. In the Railway Labor Act, Congress has comprehensively required resort to collective bargaining on all lawful proposals as a means of avoiding work stoppages; it has established no agency with power to determine that there are some matters with respect to which bargaining is mandatory and some with respect to which it is merely permissible. In the judgment of Congress, in this field collective bargaining is so vital that it is obligatory as to all matters which may lawfully be the subject of agreement.

The refusal of the Court of Appeals to recognize the duty of the Railroad to bargain is based upon (1) repeated characterizations of the Union proposal as a demand for "veto" power; (2) unsupported assertions that the discontinuance of positions is an inviolable prerogative of management; and (3) reliance on cases which deal with proposals with

respect to which agreement would be illegal or immoral, and which therefore have no bearing on the proposal of the Union in this case.

In the course of its relatively brief discussion of the legal problem presented, the court refers to the Union proposal no less than four times as a demand for "veto" power (264 F. 2d at 258, 259), and in still another place says that "the Union's proposal, if accepted, would place in its hands the power to prevent any undertaking by North Western to meet competition by modernizing its operations in the light of technological development * * *." (*Id.* at 258.) Such language is significant less for its intemperance than for its refusal to recognize or understand the process of collective bargaining which is the cornerstone of national labor policy. The Union did not and could not "demand" a "veto" power. Under the Railway Labor Act the Railroad is not required to agree to any proposal to amend the agreement. It is only required to bargain. The Union asked that it bargain over a proposed change in the contract. The proposed change, if agreed to, would have had no self-executing effect with reference to the abolition or continuance of jobs; by its own terms it would have required further bargaining with reference to any specific plan for job abolition. Had the Railroad, in compliance with its duty under the Act, bargained over the proposal, and had there been failure to reach agreement, the machinery provided by the Act would have gone into operation as to the merits of the proposal: mediation and conciliation, possible arbitration, and finally possible recommendations by an emergency board appointed at the discretion of the President. This is the process of free collective bargaining; this is not a context in which either party is in position to "demand" a "veto."

The court's determined obliviousness to the true character of the proposal suggests that the court assumed (1) that

the Union would at no stage of the bargaining process agree to a modification of the proposal, (2) that if a strike should occur because of the failure to reach agreement on the proposal the Railroad would lose the strike and have no alternative except to agree, and (3) that, if the proposal should become part of the collective bargaining agreement, the Union would never agree to the abolition of any existing positions. Perhaps the court assumed that the Railroad has no bargaining power. Since, however, the entire history of collective bargaining shows that original demands are almost invariably altered in the bargaining process, it is more likely that the court was simply unwilling to concede to the Union the right which Congress has given it—the right to have a voice in decisions affecting job tenure and measures to stabilize employment. The influence which the Union exerts on such matters through the process of collective bargaining is in no sense a veto, and to refer to it as such is to exhibit lack of understanding of, or hostility to, that process itself.

Closely related to this stigmatizing of the Union's proposal are the repeated references by the court to the question covered by the proposal as a managerial prerogative. The court speaks of "the right to manage and control the administrative functions of its business enterprise" (264 F. 2d at 258); of the "attempt by the Union to arrogate to itself the prerogatives that have been traditionally and rightfully management's" (*Ibid.*); and of an attempt to "usurp legitimate managerial prerogative." (*Id.* at 259.) These unsupported aspersions are significant less for their betrayal of the court's bias than for their demonstration of the court's indifference to the history and function of collective bargaining as an instrument of national labor policy. Practically all the subjects of modern collective bargaining were once regarded as matters within the managerial prerogative. The essence of collective bargaining

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IN THE

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Petitioners

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSO-
CIATION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE IN SUPPORT
OF PETITION, AND BRIEF

CLARENCE M. MULHOLLAND
741 National Bank Bldg.
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Bldg.
Washington 5, D. C.

*Counsel for Railway Labor
Executives' Association*

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Bldg.
Washington 5, D. C.

June, 1959

is that matters once decided unilaterally shall be determined bilaterally. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 353, 358 (1958). (Separate opinion.) The basic question in the case, the merits of which were not really considered by the Court of Appeals, is whether the employment problems which are precipitated by technological advance are to be decided arbitrarily and unilaterally by virtue of the "prerogative" of management, or are to be decided cooperatively in accordance with Congressional design through the collective bargaining process.

In concluding this portion of the discussion we must once again emphasize that, even if the court below were not so egregiously in error in its interpretation of the Railway Labor Act, it would still be fatally wrong in its conclusion that Norris-LaGuardia does not apply. For even if the subject covered by the Section 6 notice is not one with reference to which the Railroad has a statutory duty to bargain, the effect is only to bring back into effect the conditions which existed before regulation of labor-management relations imposed the duty to bargain. There would still be the right to propose subjects of agreement; there would still be the right to strike; there would still be the Norris-LaGuardia Act's prohibition against the use of the injunction against strikes. The notion that the scope of the Norris-LaGuardia Act's limitation of federal court jurisdiction is narrowed by the scope of "mandatory" collective bargaining under the Railway Labor Act—even if there is assumed to be a limit on the scope of that duty to bargain—is a figment of the court's imagination.

II.

The Court of Appeals Erred in Holding That the Case Is Not One Involving or Growing Out of a Labor Dispute, and in Directing a Permanent Injunction in Spite of the Norris-LaGuardia Act.

This Court has held that the Norris-LaGuardia Act does not preclude injunction in three situations involving railway labor:

(1) Where the dispute is a "minor" one under the Railway Labor Act—*i.e.*, a dispute concerning the application or interpretation, as distinguished from the negotiation of, provisions of a collective bargaining agreement. For such disputes the Act provides compulsory arbitration on the initiative of either party, and the Norris-LaGuardia Act has been held inapplicable to disputes pending before the Railroad Adjustment Board. *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

(2) Where the activity enjoined is in itself illegal, *e.g.*, where the union and the employer have agreed to discriminate against certain employees solely on racial grounds. *Trainmen v. Howard*, 343 U. S. 768 (1952).

(3) Where injunctive relief is necessary to compel compliance with positive mandates of the Railway Labor Act. *Virginian R. Co. v. System Federation*, 300 U. S. 515 (1937).

The Court of Appeals did not rely on the principle that a strike may be enjoined if it arises out of a minor dispute with respect to which the Act provides for compulsory arbitration. It could hardly have done so, since this case clearly involves a major rather than a minor dispute: *i.e.*, a dispute relating to the negotiation of contract terms, not to their interpretation or application. Instead it cited and relied upon the racial discrimination cases, which clearly do not support its decision, and upon a decision by the

Court of Appeals for the Sixth Circuit which is clearly distinguishable from the case at bar.

In the *Howard* case, *supra*, the carrier and the union had entered into an agreement which had the effect of causing the railroad to discharge Negro "train porters" who had been performing the duties of brakemen. At the suit of one of the Negro "train porters" against whom this agreement was directed, this Court held that Norris-LaGuardia did not deprive the courts of power to enjoin the execution of the agreement. This Court said: "'* * * Discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.'" 343 U. S. at 773. In unqualified terms the Court stamped the agreement as "unlawful" (343 U. S. at 774)—a term which by no stretch of the imagination can be applied to the agreement proposed by the Union in this case. The *Borg-Warner* case, on which the Court of Appeals relied so heavily, held only that certain subjects were not within the scope of mandatory bargaining under the Labor Management Relations Act; it specifically recognized the legality of the proposed agreements and the freedom of the parties to propose and negotiate them. The only shadow of a basis for the suggestion that the proposed agreement in this case was "unlawful" relates not to federal law—to the purposes for which the Railway Labor Act sanctioned the use of economic power—but to the Court of Appeals' wholly indefensible notion that the rights of the parties under the Railway Labor Act must be subordinated to the permissive orders of State regulatory commissions. Yet the Court of Appeals says: "We see no material difference between the *Howard* case and the case before us." 264 F. 2d at 259. There are none so blind as those who will not see.

Since the agreement proposed by the Union's Section 6

notice would have been a perfectly lawful one, the Court of Appeals' decision that the Norris-LaGuardia Act does not apply can be supported only by the notion that what is here involved is not a labor dispute within the meaning of that Act. But the very line of cases on which the Court of Appeals relies establishes with complete clarity that Norris-LaGuardia was held inapplicable *not* because there was no labor dispute but because the activity enjoined was outlawed by federal law and policy. In *Graham v. Brotherhood of Firemen*, 338 U. S. 232 (1949), another of the facial discrimination cases cited and relied on by the Court of Appeals, this Court said:

"In *Virginian R. Co. v. System Federation*, 300 U. S. 515, we held that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act . . . enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-LaGuardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.' . . ."

"But the Brotherhood urges that the controversy in the *Virginian* case did not involve a labor dispute within the meaning of the Norris-LaGuardia Act and that accordingly that case must be distinguished on its facts. The Act defines a 'labor dispute' to include 'any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. . . .'" 29 U. S. C. § 113(c). . . . We do not accept the Brotherhood's invitation to narrow the meaning of that term. The purpose of

the Act would be vitiated and the scope of its protection limited were it to be construed as not extending to efforts of a duly certified bargaining agent to obtain recognition by an employer. Moreover, if this Court had considered that a labor dispute was not involved, it would hardly have taken the trouble, in the *Virginian* case, to refute contentions based upon parts of the Act, which as a whole extends its protection solely to such disputes." 338 U. S. at 237-38. (Emphasis in the original.)

In short, this Court has never held the Norris-LaGuardia Act inapplicable in a railway labor situation on the ground that the case was not one involving or growing out of a labor dispute within the meaning of that Act. It has only held that injunctions are available: (1) to require adherence to the Railway Labor Act's procedure for compulsory arbitration of minor labor disputes; (2) to prevent the execution of agreements which discriminate solely on grounds of race and are therefore inconsistent with the policy of the Railway Labor Act and unlawful; and (3) to vindicate rights positively conferred by the Railway Labor Act.

The other case relied on by the Court of Appeals is the decision of the Sixth Circuit in *Brotherhood of Railway Trainmen v. New York Cent. R. Co.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied 355 U. S. 877. There the strike was regarded by the court as a mere protest by the union against a managerial decision to close a certain yard, there being no relevant provision in the collective-bargaining agreement. There was no proposal for a new contract, or contract term. There was no Section 6 notice. There was no history, as here, of a consistent refusal by the railroad to bargain over a properly filed Section 6 notice. There was no existing controversy with regard to reallocation of jobs. Here approximately one hundred positions other than station agent positions had been abolished and

many more were threatened. In the *New York Central* case the National Mediation Board found that it had no jurisdiction; here the Board took jurisdiction and exhausted the mediation provisions of the Act, even intervening a second time on its own motion.

III.

The Court of Appeals Erred in Ordering an Injunction Notwithstanding the Provision of Section 8 of the Norris- LaGuardia Act, Which Precludes Injunctive Relief to Any Complainant Who Has Failed to Comply With Obli- gations Imposed by Law and to Make Reasonable Efforts to Settle the Dispute.

The record in this case plainly shows that the Railroad persistently and intransigently refused to discuss the contract change proposed in the Union Section 6 notice. Section 8 of the Norris-LaGuardia Act and Section 2, First, of the Railway Labor Act are set out above at pp. 5 and 6.

Section 8 prohibits the injunction. The proposal of the Union was made in good faith. That there was a genuine dispute there can be no doubt. If it should be ultimately and authoritatively determined that the issue was not a bargainable one under the Railway Labor Act, certainly it cannot be said that on that question there was not room for a reasonable difference of opinion. Yet the response of the Railroad to the serious problem tendered in good faith by the Union's Section 6 notice was one of obdurate refusal to discuss the matter in order to avert what the Railroad itself characterizes as a major interruption of commerce. This obduracy and this refusal to participate in any way in the processes prescribed by the Railway Labor Act for the settlement of disputes disqualifies the Railroad as an applicant for injunctive relief. *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

IV.

The Court of Appeals Erred in Holding That the Section 6 Notice Did Not Relate to Matters of "Rates of Pay, Rules and Working Conditions" as Those Terms Are Used in the Railway Labor Act.

The Court of Appeals ordered the issuance of the injunction in this case on the ground that the § 6 notice did not relate to "rates of pay, rules and working conditions" as those words are used in the Railway Labor Act. Section 2, First, 45 U. S. C. § 152, First. The speciousness of its conclusion has already been demonstrated in Part I of this brief. It is proposed here to point out only that the Court of Appeals was in error with regard to its premise as well as its conclusion.

The argument of the Court of Appeals is not dissimilar to that rejected by the 10th Circuit. In *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 53 (C. A. 10, 1956), cert. denied 351 U. S. 918 (1956), it was "contended that compulsory retirement of railroad workers is not a proper subject for collective bargaining under the Railway Labor Act. * * *" The Court held, in accord with *Inland Steel Corp. v. N. L. R. B.*, 170 F. 2d 247 (C. A. 7, 1948), and *Lamon v. Georgia Southern & Florida Ry. Co.*, 212 Ga. 63, 90 S. E. 2d 658 (1955), that compulsory retirement was a proper subject for bargaining. It properly stated: "The Act is remedial and should be broadly and liberally construed * * *" 229 F. 2d at 55. And as this Court noted in the *Borg-Warner* case: "Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. E. g., *Labor Board v. J. H. Allison & Co.*, 165 F. 2d 766 (merit increases). * * * Provisions which two decades ago might have been thought to be the exclusive concern of

labor or management are today commonplace in such agreements." 356 U. S. at 353, 358.

On this subject, however, history is even more persuasive than logic. "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346 (1944). And the history of the railroad industry demonstrates conclusively that the subject of the § 6 notice in this case has consistently been dealt with as an appropriate subject for bargaining under the Railway Labor Act.

Collective bargaining as to the length or term of employment is commonplace. There are a variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the Union are in existence on at least two railroads. (Find. 17, App. 356-357.)*

* In making this finding of fact the District Court in addition to considering the evidence on this issue took judicial notice of the great extent of collective bargaining in this field. Provisions relating to length and duration of employment, dismissal and discharge, job rights in a craft, departmental and plant-wide basis, seniority as a controlling criterion in hiring, promotion, demotion, transfer and lay-offs are standard in collective bargaining agreements throughout the country, including the railroad industry. "The negotiation of guarantees of pay or work represents a major area of concern in collective bargaining today. Contracts containing such guarantees amount to about 13 per cent of a balanced random sample of 400, but their coverage extends to two-and-a-half million workers." 2 Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts (BNA), 53:1 (2-22-57). "Roughly a seventh of union agreements grant employees leaving the company separation pay * * *." *Ibid.* 40:361 (4-5-57). Many

The Railroad recognized that stabilization of employment was a bargainable subject by its participation in the National Agreement of 1956. That agreement specifically excepts from the operation of a three-year moratorium on certain specified Section 6 notices, notices dealing with stabilization of employment and separation allowances. It expressly provides for the serving of such notices and negotiation of agreements concerning them. (National Agreement, November 1, 1956, Article VI(e), App. 269.) The Railroad further recognized the bargainability of the same subject by negotiating and entering into agreements with most of the non-operating Brotherhoods on its property, not including the Union, for severance pay allowances upon the discontinuance of positions. Severance pay is one method of stabilizing the employee's situation pending his finding another job. The severance pay tides him over during the period of unemployment following discontinuance of position, and discourages dismissals thereby stabilizing employment. The Railroad further recognized the negotiability of the whole subject of stabilization of employment by insisting upon and having incorporated into the severance pay agreement a three-year moratorium prohibiting service of 30 days' notice relating to "stabilization of employment, separation allowance or other similar requests or demands", for all the Brotherhoods signatory to the agreement (Pl. Ex. 13, App. 308).

The fact that the National Agreement of 1956 mentions separately notices concerning separation allowances and notices concerning stabilization of employment indicates that the Carriers signatory to the agreement, including the

such agreements provide for payment of separation pay for job or plant discontinuance. *Ibid.* 40:362-366 (4-5-57). Limitations on the right to dismiss employees no longer needed because of technological changes are also found in collective agreements. *Ibid.* 65:121 ff. (6-15-56). See also 1 Werne, *Law and Practice of the Labor Contract* 72 ff. (1957).

Railroad, recognized that notices could be served making demands going beyond ordinary separation allowances. (National Agreement, November 1, 1956, Article VI(e), App. 269.) See National Mediation Board Interpretations 72, 72-A, 72-B (January 14, 1959).

The present collective agreements between the Railroad and the Union contain many standard provisions concerning job security. These include the so-called scope rules which give the Telegrapher's craft exclusive right to perform certain designated work, and extensive seniority provisions. The close relationship between seniority and stabilization of employment was recognized even by the Seventh Circuit in *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247, 252 (C. A. 7, 1948) as follows:

"Among the purposes which seniority serves is the protection of employees against arbitrary management conduct in connection with hire, promotion, demotion, transfer and discharge, and the creation of job security for older workers."

V.

The Court of Appeals Erred in Holding That State Regulatory Commissions Can Relieve the Railroad of Its Obligations Under the Railway Labor Act.

Having secured permission from the regulatory commissions of Iowa and South Dakota to abolish a large number of jobs held by union members, after the § 6 notice had been served upon it, the Railroad successfully urged on the Court of Appeals the proposition that the commission orders relieved it of the obligation imposed upon it by the Railway Labor Act to bargain with the Union over matters relating to "rates of pay, rules and working conditions." The Court of Appeals held that: "The Commission orders may not be circumvented by a

contract entered into by a carrier and a union under threat of strike." 264 F. 2d at 259.

The patent error of the argument and the holding is evident, first, because the commission orders were permissive rather than mandatory, i.e., they authorized the Railroad to abolish the positions which it had sought permission to abolish but did not require them to do so in conflict with its obligations under the Railway Labor Act.* Second, the error is predicated on the rejection of the proposition that the Supremacy Clause of the Constitution requires the State commissions to subordinate their rules to the mandates of Congressional legislation. The consequences of the Court of Appeals ruling would subject all collective bargaining contracts to the control of state agencies. But as this Court said in *California v. Taylor*, 353 U. S. 553, 561 (1957): "Under the Railway Labor Act, not only would the employees * * * have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement * * * would take precedence over conflicting provisions of the state * * * laws."

VI.

The District Court Was Without Jurisdiction to Entertain This Suit Since There Was No Diversity of Citizenship Between the Parties and No Question "Arising Under the Constitution or Laws of the United States" Was Presented.

Since the Railroad's principal place of business is located in Illinois (App. 5) and the individual petitioners are citizens of Illinois (*ibid.*), jurisdiction cannot be rested on § 1332 of the Judicial Code, as amended July 25, 1958, prior to the filing of this action.

* See footnote on p. 10, *supra*.

No jurisdiction can be predicated upon § 1331 of the Judicial Code for the reasons stated by Mr. Justice Rutledge in this language: "the cause of action is one merely for the exercise of the general police power in the protection of the railroad's property. The complaint * * * does not specify any provision of the federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act [and the Railway Labor Act] * * * cf. *Cohens v. Virginia*, 6 Wheat. 264; *Norton v. Whiteside*, 239 U. S. 144; *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Gully v. First National Bank*, 299 U. S. 109." *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 54-55, n. 5 (1944).

The issue, as thus put by Mr. Justice Rutledge, was specifically left undecided by the Court in the *Toledo* case: *Id.* at 55. We respectfully urge that it calls for a decision by this Court in the instant case.

VII.

The Court of Appeals Erred in Not Reversing the District Court's Holding That Rule 62(c) of the Federal Rules of Civil Procedure Permits the Issuance of an Injunction Pending Appeal Where the Norris-LaGuardia Act Prohibits the Issuance of an Injunction and the Holding That the Railway Labor Act Withdraws the Right to Strike for a Second Thirty Day Period Following the Failure of Emergency Mediation Services.

The Court of Appeals purported to dispose of all of the issues raised by the petitioners and respondents on their respective appeals to that court. 264 F. 2d at 256. It thus ruled adversely on petitioners' contentions (1) that Rule 62(c) of the Federal Rules of Civil Procedure cannot authorize the issuance of an injunction pending appeal

where the Norris-LaGuardia Act prohibits the issuance of an injunction; and (2) that the Railway Labor Act does not withdraw the right to strike for a second thirty-day period following the failure of emergency mediation services.

We concede that if the Court of Appeals had been right in its conclusion that a permanent injunction against the strike was not precluded by the Norris-LaGuardia Act, there would be no need to reach these questions. Inasmuch as the Court of Appeals' judgment on the permanent injunction was clearly erroneous, however, it follows that these additional questions, which were raised by the petitioners in their petition for certiorari before judgment, should be decided.

CONCLUSION.

For the reasons heretofore set out, petitioners respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Seventh Circuit and reverse the judgment of that court.

Respectfully submitted,

ALEX ELSON,
LESTER P. SCHOENE,

1625 K Street, N. W.,
Washington 6, D. C.,

Attorneys for Petitioners.

BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,
Of Counsel.

Dated June 8, 1959.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No.

THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,
Petitioners

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION

The Railway Labor Executives' Association hereby respectfully moves the Court for leave to file the annexed brief *amicus curiae* in support of the petition for certiorari filed in this case by The Order of Railroad Telegraphers, et al. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but refused.

I

The Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., with which are affiliated twenty-three

standard national and international railroad labor organizations that are the duly authorized representatives of more than 90% of the nation's rail employees under the Railway Labor Act. (45 U.S.C.A. 151 et seq.) The names of these individual organizations are:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and
Enginemen
Brotherhood of Maintenance of Way Employees
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station
Employees
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees and Bartenders
International Union
International Association of Machinists.
International Brotherhood of Boilermakers, Iron
Ship Builders, Blacksmiths, Forgers and
Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters, Mates &
Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

This Court has heretofore recognized the Association
as a proper party to appear and speak for these organi-
zations and their member employees. *Interstate Com-*

merce Commission v. Railway Labor Executives' Association, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al. v. United States*; 355 U.S. 141 (1957).

II

The Association and the individual organizations of which it is composed have a substantial interest in the petition for certiorari filed by The Order of Railroad Telegraphers because the decision of the Court of Appeals for which review is sought by that petition, if left standing, will seriously restrict collective bargaining under the Railway Labor Act and will leave the employees represented by the organizations affiliated with the Association at the mercy of their railroad employers. Practically all of the individual labor organizations affiliated with the Association are parties to notices filed with railroads under Section 6 of the Railway Labor Act proposing agreements for the stabilization of employment similar to the notice involved in the present litigation. Moreover, the effect of the decision below is much more far sweeping than to simply forbid railway labor organizations from pursuing negotiations on such notices. The decision imposes restrictions on the commands of the Railway Labor Act that employees and carriers exert reasonable efforts to settle "all disputes" between them in conference and substitutes the Federal courts as the arbiters of what disputes may or may not be settled by such negotiations. This constitutes a direct judicial interference in the realm of collective bargaining that was never intended by Congress and was in fact long ago outlawed by statutory enactment. The decision also holds that state agencies may grant a railroad permissive au-

thority which will bar collective bargaining under the Railway Labor Act. This constitutes a novel and disastrous limitation on the Federal statute.

III

This interest of all railway labor organizations in the decision below and its broad impact upon all their collective bargaining efforts in the rail transportation field cannot adequately be presented by petitioners. The petitioners must of necessity direct their attention primarily to the immediate problems created for their own organization by the decision below. In addition, the petitioners are not in the same position as is the Association to speak for the whole of railroad labor on the adverse impact of such decision generally on collective bargaining in the rail industry. The presentation of these considerations is clearly relevant to the disposition of the petition as it demonstrates not only the importance of the questions of Federal law that are involved but also bears strongly upon the correctness of the decision for which review is sought.

WHEREFORE, the Association moves the Court for leave to file the brief annexed hereto in support of said petition for certiorari.

Respectfully submitted,

CLARENCE M. MULHOLLAND
741 National Bank Bldg.
Toledo 4, Ohio.

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Bldg.
Washington 5, D. C.

*Counsel for Railway Labor
Executives' Association*

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois and the opinion of the Court of Appeals are attached as appendices to the petition.

JURISDICTION

The petition adequately sets forth the basis of jurisdiction.

QUESTIONS PRESENTED

In addition to the questions set forth in the petition, this case, in the opinion of the Association, presents the question of whether Congress intended to nullify

collective bargaining in the railroad industry by requiring labor organizations to litigate in advance their right and duty to settle particular disputes with railroads through negotiation or whether the Railway Labor Act means what it says in imposing a duty on employees and carriers to settle *all* disputes in conferences between them in order to avoid interruptions to commerce.

STATUTES INVOLVED

The statutes involved are set forth in full in the petition.

STATEMENT

The facts relating to the development of the present litigation are set forth in the petition.

REASONS FOR GRANTING THE WRIT

1. There can be no question but that the petition for certiorari raises some of the most important problems in the construction and application of the Railway Labor Act and the Norris-LaGuardia Act ever presented to this Court. The decision below represents the first time that a Court of Appeals has placed limitations upon the subject-matter of a notice served under Section 6 of the Railway Labor Act or has restricted the Congressional mandate of Section 2 of that statute (45 U.S.C.A. 152), imposing a duty on carriers and their employees to exert every reasonable effort to settle "all disputes" in conference between them whether arising out of the application of agreements or otherwise. In so doing, the decision below has interpreted the Railway Labor Act and the Norris-LaGuardia Act in a manner which will effectively hamstring collective bargaining in the railroad industry.

and destroy the usefulness of the former statute as a vehicle for peaceful labor-management relations in that industry. Under the decision below, a carrier can simply refuse to negotiate upon any subject presented to it in a Section 6 notice and the organizations representing carrier employees have no recourse except long and expensive litigation to determine whether they are even to be permitted to bargain. The Federal Courts thus become the arbiters of whether collective bargaining shall even begin while at the same time the employees are enjoined from pressing their request for conferences to settle their dispute. The stultifying effect of such a decision on collective bargaining in the railroad industry is so obvious as not to require argument. The correctness of an interpretation of two Federal statutes bringing about such a result clearly raises issues which this Court ought to review and decide.

In addition, the Court of Appeals has indicated that the permission given the respondent railroad by the South Dakota and Iowa Commissions to put into effect its so-called Central Agency plan is a bar to any bargaining under the Railway Labor Act concerning the continued employment of the men involved. The suggestion that such permission of a state agency can override the mandatory bargaining requirements of a Federal statute gives rise to fundamental questions regarding the regulation of interstate commerce which should be reviewed by this Court. If the obligations of the Railway Labor Act can be nullified by state action, those obligations have little meaning.

2. The decision below is believed to conflict with decisions of this Court concerning the right of employees

to strike, the application of the Norris-LaGuardia Act, and the scope of the Railway Labor Act.

The decision is contrary to the decision in *United States v. Carrozo*, 37 F. Supp. 191 (D.C. Ill., 1941), sustained by this Court per curiam in *United States v. International Hodcarriers, et al.*, 313 U.S. 539 (1941), and the decisions in *United States v. American Federation of Musicians*, 47 F. Supp. 304 (1942), affirmed by this Court per curiam in *United States v. American Federation of Musicians*, 318 U.S. 740 (1943). In the *Carrozo* case, the District Court involved made the following findings with respect to lawful activities of a labor organization:

"Such normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce their demands, as in the present case a demand against the use of labor saving devices which will displace their members; or, in the alternative, the demand that if the labor saving device is used the same number of men be employed as would be if the other type of mixer were used. These are legitimate and lawful activities which a labor union is permitted to carry on in an effort to maintain employment and certain working conditions for its members, and any restraint of trade or commerce attendant thereon is only indirect and incidental."

This is a square holding, affirmed by this Court, to the effect that it is a legitimate and lawful activity for a labor union to protect job opportunities and stabilize employment by seeking agreement with employers on the use of labor saving machinery, which is certainly one of the objectives of the proposals here involved.

The Association also believes that the decision of the Court of Appeals with respect to the application of the Norris-LaGuardia Act is contrary to the decisions of this Court which make clear that such statute was intended to "drastically" curtail the jurisdiction of Federal courts in the labor field and that the term "labor dispute" as used in that Act must be given a liberal interpretation in light of its purpose. *Milk Wagon Driver's Union Local 753 v. Lake Valley Farm Products*, 311 U.S. 91 (1940). In holding that the threatened strike did not arise out of a labor dispute within the meaning of the Norris-LaGuardia Act because of the purposes thereof, the decision below is directly contrary to that of this Court in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), where the Court declared (pp. 559-560) :

" * * * The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

Moreover, the decision below is inconsistent with the decision of this Court in *Hunt v. Crumbach*, 325 U.S. 821 (1945) where the Court declared that Congress recognized an absolute right in employees to strike according to their own judgments (p. 825, f.n. 1) :

"Dorchy v. Kansas, 272 U.S. 306, 311, 71 L.ed. 248, 269, 47 S. Ct. 86, cited here in dissent, has

no relevancy to the issues before us. In that case Dorchy was convicted of calling a strike to enforce a state claim contrary to state law. He attacked the state law on the ground that the right to strike was guaranteed by the Fourteenth Amendment. This Court rejected Dorchy's constitutional contention with the statement that 'Neither the common law nor the Fourteenth Amendment, confers the absolute right to strike.' The Court had no reason in the Dorchy case to consider the Clayton Act, which as we decided in the Hutcheson Case does recognize an absolute right of employees to work or cease working according to their own judgments. That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations."

The Association also believes that the decision of the Court of Appeals with respect to the application of the Norris-LaGuardia Act is in direct conflict with the decision in *Diamond Full Fashion Hosiery Co. v. Leader*, 20 F. Supp. 467 (D.C.E.D., Pa., 1937), which was handed down by then District Judge Maris, now Senior Circuit Judge of the Third Circuit, in which the court held that the Norris-LaGuardia Act prohibited it from enjoining a strike by the employees of a plant to prevent the shutting down of that plant and the transfer of its machinery for use in a business in another state. In holding the Norris-LaGuardia Act applicable to the situation, the Court declared (p. 469):

"Does it involve a controversy concerning terms of conditions of employment? I think it does. *Certainly the duration of employment is one of its most vital terms.* Here the defendants had

a union contract which was in force on August 6, and it was their contention that they had been locked out of their employment by the Vogue Company. I am satisfied from the evidence that their sole purpose in picketing the Vogue Mill was to endeavor to get their jobs back. All of the elements of a labor dispute were present. *Whether the defendants' position was justified or had any real basis is beside the point and is not for this court to pass upon. The fact remains that there was a dispute between the defendants and the Vogue Company and that it was a labor dispute.*" (Emphasis supplied.)

The appeal from this decision of the Third Circuit was dismissed on agreement of counsel, 99 F. 2d 1001 (1937).

The holding of the court below that the permission granted the respondent by state agencies to put into effect its so-called Central Agency plan bars negotiation pursuant to the Section 6 notice served on respondent by petitioners obviously conflicts with the holding of this Court in *California v. Taylor*, 353 U.S. 553 (1957).

3. The decision below is incorrect. The petition analyzes the error involved in the reasoning upon which the decision below is based. This analysis and argument, which will not be repeated here, demonstrate the invalidity of that decision. In addition, such invalidity is further demonstrated by the fact, as shown above, that it is contrary to an extensive line of decisions broadly applying the right to bargain and strike and giving a liberal interpretation to the Norris-LaGuardia Act. The decision below represents a step backward on the long road in the development of collective bargaining. Its adverse effect upon such bargaining,

as previously shown, strongly militates against the correctness of the decision as a proper interpretation and application of statutes designed to obtain industrial peace through face to face bargaining of carriers and employees.

CONCLUSION

For the foregoing reasons, the petition of The Order of Railroad Telegraphers for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE M. MULHOLLAND
741 National Bank Bldg.
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Bldg.
Washington 5, D. C.

*Counsel for Railway Labor
Executives' Association*

June, 1959

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JUL 6 1959
JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

October Term, 1959

No. [redacted] 100M

**THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,**
Petitioners,

vs.

**CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,**
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI.**

CARL McGOWAN,
JORDAN JAY HILLMAN,
Attorneys for Respondent,
400 West Madison Street,
Chicago 6, Illinois.

EDGAR VANNMAN, Jr.,
ROBERT W. BUSHNELL,
Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958.

No. 984

THE ORDER OF RAILROAD TELEGRAPHERS;
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI.**

Chicago and North Western Railway Company ("North Western"), under Rule 24 of this Court, submits this brief in opposition to the petition for certiorari filed by The Order of Railroad Telegraphers, *et al.* ("ORT").*

STATEMENT.

In order that the Court may see the actual—and markedly narrower—setting giving rise to the issues which the petition seeks to present, the ORT's statement requires supplementation. These further facts relate to (1) the direct connection between the contract demand and the Central

* Record references hereinafter are to the Joint Appendix filed by the ORT with its petition. Emphasis is supplied throughout this brief.

Agency Plan; (2) the efforts by North Western to bargain with the ORT on a meaningful basis; and (3) the independent basis for injunctive relief to which North Western is entitled under *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

1. On April 1, 1956 a new management took over at North Western. The first quarter loss had been \$8,000,000; and the cash position was deteriorating so fast as to raise the spectre of bankruptcy. A principal reason for this was that North Western had lagged badly in the adaptation of its operations to new and changed conditions, with the result that it had the worst (*i. e.*, the highest) ratio of wage and salary expense to the revenue dollar of any railroad (App. 82-86).

The new management initiated a number of modernization programs (App. 86-88); and, in order to cushion the economic impact of these programs on the employees affected, it entered, on December 27, 1956, into the first Supplemental Unemployment Benefits Agreement in railroad history. All of the major non-operating organizations, except the ORT, to which it was also offered, were parties to this agreement (App. 102-103, 303ff.).

On November 5, 1957 North Western first announced a modernization program affecting the ORT. On that date it petitioned the Public Utilities Commission of South Dakota for authority to place in effect its Central Agency Plan "under which the service area of certain station agents was extended to include a neighboring station or stations without any curtailment of service to shippers" (264 F.2d at p. 256). The petition disclosed that authority for the Plan would be sought on a system-wide basis, and petitions to this end were subsequently filed with the regulatory commissions of Iowa, Minnesota and Wisconsin (App. 90-91). Approximately six weeks after this disclosure, and after the presentation in the South Dakota

hearings of North Western's direct case and the ORT's cross-examination in respect of it, the ORT served on North Western, purportedly under Section 6 of the Railway Labor Act, a demand that a clause be added to the existing contracts providing that no position filled by a member of the ORT on December 3, 1957 may be abolished or discontinued without the prior consent of the union (App. 32).¹

Hearings were held before the South Dakota Commission at various points throughout the state beginning November 25, 1957 and ending January 17, 1958. The ORT appeared in those proceedings (as it did in the other states) to protest the granting of the authority sought, presented evidence, and, at the conclusion of the hearings, filed a brief and participated in oral argument before the Commission. On May 9, 1958 the Commission entered an order which directed North Western to put its Plan into effect forthwith (App. 172ff., 91-92).

The petition in Iowa was filed January 24, 1958; and the Iowa State Commerce Commission held hearings on it throughout the state beginning March 18, 1958 and ending June 6, 1958. The Commission's decision (App. 216ff., 230-231, 92-93) putting the Plan into effect came on August 11, 1958.²

1. As the Court of Appeals notes in its opinion (264 F. 2d at p. 256), throughout the state commission proceedings the ORT asserted that the Central Agency Plan could not be effectuated under the limitations of its existing contracts with North Western. North Western has denied that this is so; and this issue as to the application or interpretation of an existing contract would appear to present a "minor dispute" under the Railway Labor Act. Although the Plan was placed in effect in South Dakota and Iowa in May and August of 1958, respectively, no grievances or claims for lost pay based upon the ORT's construction of the existing contracts were submitted to North Western until after the District Court's judgment had been entered.

2. The Central Agency Plan was also approved by the Minnesota and Wisconsin Commissions on November 12, 1958 and January 20, 1959, respectively (Minnesota—Docket A-7559; Wisconsin—Docket 2-R-3380). Judicial notice may be taken.

On July 10, 1958—after the South Dakota order but while the proceedings were pending in the other states—the ORT circulated to all its members a letter and strike ballot (App. 54). That letter stated in part:

"Last fall a program of this sort that is of vital concern to our members was initiated by this management. This program is directed at the elimination of the vast majority of agents serving one-man stations. Proceedings were begun before the Public Service Commission of South Dakota, Minnesota, Iowa and Wisconsin seeking authority either to close nearly all the one-man stations or to have one agent serve two, three or four stations. Similar proceedings in other states may be expected momentarily.

"In the public interest, as well as in the interest of our members and the organization as a whole, we have done everything possible to resist this program. Through reliance on the provisions of our Agreements; through informing the residents of the affected communities as to the consequences of the railroad's actions and through attendance at all the hearings of the various commissions and the presentation of evidence and argument, we have tried to make reason, common sense and humanity prevail. Since last November practically all of the time of your General Chairmen and four Vice Presidents as well as much of the time of a number of our Local Chairmen and our General Counsel and of our President has been devoted to these efforts.

"However, it became evident at an early date that to meet this onslaught effectively would require strengthening of our Agreements. . . ."

"While we hope the commissions in other states will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota."

One week after the Iowa Commission issued its order, the ORT issued a strike call for August 21, 1958. In this

call, quoted at length in the opinion below, appears this language (264 F. 2d at p. 257):

"The need for the proposed rule has again been tragically demonstrated in the last few days. What happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged."

2. Approximately two weeks after the South Dakota Commission entered its order on May 9, 1958, Mr. Ben W. Heineman, North Western's Chairman, sought out Mr. George E. Leighty, President of the ORT, and inquired as to whether the ORT would be interested in discussing terms for cushioning the impact of the Central Agency Plan, either in respect of South Dakota or on a system-wide basis. Although these overtures were rejected, Mr. Heineman stated that his door would always remain open for such discussions (App. 76-77, 105).

On August 27, 1958 Mr. Heineman again directly indicated to the ORT his willingness to discuss any alternatives designed to minimize the economic impact of the Plan on the employees affected, including severance pay; and the ORT was informed that the Supplemental Unemployment Benefits Agreement would be extended to it on a retroactive basis to December 3, 1957, the date fixed in the contract demand (App. 99-106, 118-119).

In the course of the emergency mediation after the strike call, the Federal Mediator asked North Western's Director of Personnel for any suggestions which might conceivably form a basis of settlement. Mr. Van Patten said that, without prejudice to his position regarding the illegality of the demand, he thought there was a possibility of settling the entire question involving the proposed rule by an arrangement limiting the number of layoffs per year to an agreed percentage of the total jobs, over and above the reductions attributable to attrition. The Mediator in-

dicated that this gave him something to work with and that, if the ORT was at all interested, he would call Mr. Van Patten the following day. He did not call (App. 157-58).

3. North Western and the ORT are parties to the so-called National Agreement of November 1, 1956. Article VI of that Agreement provides that, until its expiration on October 31, 1959, no contract demand will be served which establishes compensation in respect of time paid for but not worked (App. 100). Although there is an exception for proposals relating to "stabilization of employment", Special Board of Adjustment No. 215 has found that proposals for payments for time not worked do not fall within the meaning of this exception (App. 287ff.). On August 21, 1958 North Western advised the ORT that it considered the contract demand to be barred by this moratorium provision; and the following day North Western filed its submission of this dispute with the National Railroad Adjustment Board, where the matter is pending for decision (App. 247, 314).

QUESTIONS PRESENTED.

1. Did Congress intend that the interruption of interstate commerce incident to a railroad strike can be founded upon a contract demand that no position in being on a date antecedent to the demand be discontinued without the union's consent, where the purpose and effect of such demand is to prohibit the carrier's compliance with state commission orders in a sector of interstate commerce left by Congress to state regulation in the interest of economical and efficient transportation service to the public?
2. May a labor organization lawfully strike to enforce a demand, the propriety of which under the moratorium clause of an existing labor agreement presents a substantial question as to the application or interpretation of, that

agreement, thereby involving a "minor dispute" which has itself been duly submitted to, and is pending before, the National Railroad Adjustment Board?

REASONS FOR DENYING THE WRIT.

1. The decision below has neither the novelty nor the breadth of application claimed for it in the petition. The Court of Appeals, taking careful note of the special facts of the relationship between the contract demand and the Central Agency Plan, held that the collective bargaining processes of the Railway Labor Act cannot be so used to circumvent or subordinate state regulation, citing its own earlier holding to this effect in *In re Chicago, North Shore and Milwaukee R. Co.*, 147 F. 2d 723, cert. denied, 325 U. S. 852 (1945). This case was founded upon *Missouri Pacific R. Co. v. Norwood*, 42 F. 2d 765 (D. C. W. D. Ark. 1930), aff'd 283 U. S. 249, and *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943), where this Court told the carriers that Congress had provided no sanctuary in the Railway Labor Act from state regulation. There is, thus, no important question of federal law presented by the petition which has not been settled by this Court; nor is there any conflict of decision.

2. Over and above the matter of state regulation, the decision below reflects the special facts of record which show the incompatibility between the demand and other Congressional objectives in respect of economic, efficient and uninterrupted interstate transportation; and the resulting accommodation of Norris-LaGuardia to these policies is fully consistent with this Court's recognition that such accommodation must be made.

3. North Western was entitled to the injunctive relief directed by the Court of Appeals on a ground presented to, but not reached by, that court, namely, the pendency before

the National Railroad Adjustment Board of the issue of whether the ORT's contract demand was barred by the moratorium provisions of the National Agreement. The injunction can, thus, rest squarely on this Court's holding in *Chicago River*.

4. The challenge to the jurisdiction of the District Court, urged for the first time in this Court, is wholly lacking in substance. *Chicago River* itself, where diversity was lacking, is a clear authority to this effect.

5. Contrary to the assertions in the petition, the Court of Appeals did not dispose of the issues of (1) the propriety of the injunction pending appeal and (2) the cooling-off period limitations of the Railway Labor Act. With the disposition it made of the merits of North Western's appeal, it had no occasion to pass upon these questions. It has not, therefore, in the words of Rule 19, "*decided an important question of federal law.*"

ARGUMENT.

I.

The Court of Appeals Correctly Held, on the Basis of Established Law, That Congress Did Not Intend That the Interruption of Interstate Commerce Incident to a Railroad Strike Could Result from a Demand Directed Against the Effectuation of Valid State Regulatory Orders.

The decision below reflects the settled proposition that the collective bargaining processes of the Railway Labor Act were never intended to permit the frustration of legitimate state regulatory requirements. This dominant concern of the Court of Appeals clearly emerges from its opinion. Thus, the Court recites these facts (264 F. 2d at p. 256):

"North Western filed petitions for authority to effectuate the Central Agency Plan with the public utilities commissions of South Dakota, Iowa, Minnesota and Wisconsin. In South Dakota, the Public Utilities Commission held hearings at various points throughout the State over a period of about two months. The Union appeared in the proceedings to protest the granting of the authority sought; presented evidence, participated in filing briefs with, and in oral argument before, the Commission. • • •

"In the Commission proceedings, the Union took the position that the Central Agency Plan could not be put into effect without agreement of the Union under the existing collective bargaining contracts. However, a few weeks after North Western filed its first petition in South Dakota, the Union sent North Western letters under Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 151, *et seq.*) requesting that the existing

collective bargaining agreements be amended by adding the following provision:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization."

The Court also attached importance to the primary purpose expressed in the ORT strike call of rendering ineffective the regulatory orders of the South Dakota and Iowa Commissions (264 F. 2d at p. 257).

With reference to these unique facts as they had developed between this union and this railroad, the Court of Appeals made these additional statements leading inexorably to its ultimate holding (264 F. 2d at pp. 258-259):

"Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. The Union is thus attempting to attain, through the collective bargaining processes of the Railway Labor Act, that which would prohibit North Western from complying with the orders of the South Dakota Public Utilities Commission and the Iowa State Commerce Commission.

"This contract proposal, if accepted, would enable the Union to control the pace of North Western's compliance with the Commission orders aforesaid.

"A carrier may not escape its obligations by bargaining them away. The Commission orders may not be circumvented by a contract entered into by a carrier and a union under threat of strike."

The Court thereupon stated its conclusion in these terms (264 F. 2d ~~p.~~ 260):

"We, therefore, hold that such a demand as here made by the Union is completely outside the ambit of 'rates of pay, rules and working conditions', as those words are used in the Railway Labor Act, *In re Chicago North Shore and M. R. Co.*, 7 Cir. 1945, 147 F.

2d 723, 727, cert. den. 325 U. S. 852, and hence is not within the scope of mandatory bargaining. Therefore, the terms of the Norris-LaGuardia Act are here inapplicable."

The citation of *North Shore* is of basic significance, for that case was the culmination of a series of decisions holding that the collective bargaining provisions of the Railway Labor Act were not intended by Congress to permit the circumvention of state regulatory authority. In that case, the ultimate issue was whether, in order to comply with state regulatory orders, a carrier could change what the labor organization deemed to be "working conditions" under the Railway Labor Act without first reaching agreement with the organization with respect to such changes under Section 6 of that Act. In holding that compliance with state law could not be made contingent on the ability of the parties to reach prior agreement under the Railway Labor Act, the Court stated (147 F. 2d at p. 727):

"The phrase 'working conditions' means such conditions affecting the work of the employees as might be the subject of agreement between North Shore and its employees, *Missouri Pac. R. Co. v. Norwood*, D. C., 42 F. 2d 765, 773, affirmed 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010. The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work required of employees. It does not exclude a State from exercising its police power. *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, *supra*, 318 U. S. 6, 63 S. Ct. 420, 87 L. Ed. 571."

In the union's petition for certiorari to review the *North Shore* decision, denied by this Court, it was asserted that the Court of Appeals committed error "(I)n holding that the term 'working conditions' as used in Section 6 of the Railway Labor Act, does not include any and all circumstances concerning work required of employees covered in a

collective bargaining agreement." This is of significance in connection with the claim made in the ORT's petition that the Court of Appeals has once again erred in recognizing that there are limitations upon the use to be made of the collective bargaining procedures provided by Section 6.

In *Missouri Pacific*, a three-judge district court upheld the validity of an Arkansas full crew law against the carrier's claim that, in the determination of railroad working conditions, Congress, by the Railway Labor Act, had intended to vest in the collective bargaining provisions of federal law a controlling supremacy over state regulatory requirements. This Court affirmed. *Terminal Railroad* involved a similar claim—in this case in relation to a state commission requirement as to caboose cars. In rejecting this contention, this Court upheld the validity of state authority exercised in the public interest, and expressly rejected the argument that Congress intended to preempt, by the Railway Labor Act, the regulation of working conditions in such manner as to nullify state authority.³

The present case differs from these authorities relied upon by the Court of Appeals only in the fact that the ORT has, in anticipation of the state commission orders, actually served a notice, purportedly under Section 6 of the Railway Labor Act, containing a demand incompatible with compliance by North Western with those orders. By simply standing on this demand, the ORT thinks to give North Western this choice: Obey the orders and take a strike, or let us have the final say as to whether the orders may be carried out. Is it conceivable that, in *Terminal Railroad*, for example, had the carrier alertly served a Section 6 notice, it could ultimately have forced its employees to choose between a lock-out, on the one hand, and the benefits

3. Another error alleged to have been committed by the Court of Appeals in the petition for certiorari in *North Shore* was "(I)n holding that the decision of this Court in (*Terminal Railroad*) was controlling."

of the state commission order, on the other? Quite properly, therefore, in the present case the Court of Appeals held that where state regulatory authority is specifically directed to the conditions under which regulated transportation service is provided, Congress did not intend that the collective bargaining procedures of the Railway Labor Act could be used by private interests to achieve control over such state regulation.⁴

The ORT argues that the state regulatory orders in this proceeding, being permissive rather than mandatory, are accordingly relegated to a subordinate position.⁵ This seriously misconceives the regulatory function and purpose of "permissive" orders as an instrumentality of Congres-

4. Cf. *Local 24 of Int'l Brotherhood of Teamsters v. Oliver*, Oct. Term, 1958, No. 49; 79 S. Ct. 297 (1959). This case involved the relationship between (1) certain long-standing collective bargaining provisions relating to wages previously entered into under the Labor Management Relations Act, and (2) a subsequent state court construction of a state anti-trust statute having general application, but only within the area of intrastate commerce. The exercise of state authority did not occur in a regulatory field in which Congress has continued to rely on effective state regulation as an important instrumentality in furthering its policies with regard to efficient and economical transportation in interstate commerce.

5. The only authority cited by the ORT on this issue is *California v. Taylor*, 353 U. S. 553 (1957). That case holds that it was the intent of Congress that a State which owns and operates a railroad otherwise subject to the provisions of the Railway Labor Act must stand in the position of management under the Act. That case does not purport to deal with the separate issue of whether Congress intended that collective bargaining procedures of the Railway Labor Act can be used to circumvent state regulatory authority exercised in the general public interest. The significance of this distinction is not lost on the ORT which, in quoting from this case (Petition, p. 35), carefully omitted the italicized words from the following phrase "would take precedence over conflicting provisions of state *civil service laws*." It is also significant to note the response of Congress to situations in which it does wish to assert federal supremacy under the Railway Labor Act over provisions of state law. Thus, Section 2(11) of the Railway Labor Act, by a 1951 amendment, expressly authorizes union shop contracts notwithstanding any state law.

sional policy, both at the level of federal and state government.⁶

This Court has stated that a "primary aim" of Congressional transportation policy is the "avoidance of waste" and the achievement of the "essential conditions of economy and efficiency." *Texas v. United States*, 292 U. S. 522, 530-1 (1934); *Seaboard Railroad Company v. Daniel*, 333 U. S. 118, 124-5 (1948).

The elimination of unprofitable services and operations, which have been rendered obsolete by the dynamic development of competitive transportation modes, provides one basic method of realizing these objectives. The abandonment of unprofitable branch lines, the consolidation and merger of separate companies, pooled operations and the elimination of duplicate facilities through joint use of remaining facilities, are among the specific procedures available for the minimization of waste.

Interstate Commerce Commission orders exercising this authority, permissive in form though they may be, are not to be regarded as administrative favors bestowed on private interests for purely private purposes. On the contrary, they reflect the essential mutuality of the public, and the managerial, interest in the avoidance of waste. In this connection Justice Brandeis has stated, with specific reference to branch line abandonments: "The certificate issues, not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination." *Colorado v. United States*, 271 U. S. 153, 162 (1926).

While Congress has vested primary regulatory responsibility for the achievement of its aims in the Interstate Commerce Commission, it has at the same time been content

6. The initial order of the South Dakota Commission, which "authorized and directed" the inauguration of the Central Agency Plan, was in fact mandatory (App. 191, 194). The Commission's order denying rehearing did not modify this mandatory character of its order (App. 213-215).

to leave to the states a number of aspects of railroad regulation, including some which involve interstate commerce itself. Where Congress has chosen the latter course, the motivation is not a lessening of interest in the achievement of efficient and economic rail service, but rather an exercise of judgment that the job of achieving these purposes in the particular instance can safely be left to the states.

Station agencies have long been one of the areas of railroad operations left by Congress under state control. Significantly for present purposes, the last Congress decided to make no change in this area, and it struck from the Transportation Act of 1958 as introduced the language which would have given to the Interstate Commerce Commission powers with respect to station agencies comparable to those then vested in it for the first time with respect to train operations.⁷ Thus, Congress has consciously continued to leave to state regulation the responsibility for regulating station facilities in such manner as to assure that the railroad will provide the volume and pattern of service required for both inter- and intrastate commerce at the lowest cost. The fact that state regulatory orders are more often permissive rather than mandatory in form does not in any way derogate from their vital importance as an instrumentality of Congressional policy in promoting an adequate, efficient and economical national transportation system.

Having left determinations of this kind to be made by the

7. S. 3778, 85th Congress, 2d Session, added Section 13 (a) to the Interstate Commerce Act. These new provisions vest an ultimate jurisdiction in the Interstate Commerce Commission over the "discontinuance or change, in whole or in part, of the operation or service of any train or ferry". S. 3778, as originally introduced on May 8, 1958, would have also vested jurisdiction in the Commission under Section 13 (a) over the "operation or service of any station, depot or other facility where passengers or property are received for transportation in interstate, foreign and intrastate commerce,
• • •"

state commissions in the exercise of their best judgment as to what is necessary to advance the public interest in both interstate and intrastate commerce, can it be thought that it was the intention of Congress simultaneously to nullify this state authority by its complete subordination to the collective bargaining procedures of the Railway Labor Act? Did Congress intend that the South Dakota and Iowa orders may be set at naught by the economic pressure of a strike to enforce a demand that the power to determine what station agent jobs are necessary in Iowa and South Dakota be vested in the ORT rather than in the state commissions? These questions answer themselves; and they were long ago answered by this Court in the authorities relied upon by the Court of Appeals.

Meaningful collective bargaining in the railroad industry did not come to an end as a result of the *North Shore* decision and this Court's denial of certiorari, despite the following prophesy made by the union in its petition for review of that decision:

"If this Court should approve this back-door method of avoiding agreements, and winking at federal statutes, it would encourage similar action by other carriers and result in a national upheaval of serious consequences."

II.

The Decision of the Court of Appeals Involves None of the Broad Issues Which the Petition Seeks to Raise.

The ORT characterizes the opinion of the Court of Appeals as (1) embracing a "baronial" concept of managerial prerogatives, (2) establishing the federal courts as the arbiters of the appropriate subjects for collective bargaining, and (3) reviving the historic abuses banned by Norris-LaGuardia. The Court's decision, reflecting a proper accommodation of general Congressional policies

embodied in the Interstate Commerce, Railway Labor and Norris-LaGuardia Acts, supports none of these characterizations.

1. Reliance on the efficient discharge of the managerial function as a major instrumentality in promoting Congressional regulatory aims is reflected in Section 15a(2) of the Interstate Commerce Act. The importance of carrier initiative to achieve the public aim of waste avoidance is further emphasized in the following criticism made by the Senate Committee on Interstate and Foreign Commerce in its report on S. 3778, culminating in the Transportation Act of 1958:

"The railroad industry has not, in the sub-committee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; joint use of facilities in order to eliminate waste, such as multiple terminals and yards that require expensive interchange operations; reduction of duplications in freight and passenger services by pooling and joint operations; abandonment or consolidation of non-paying branch and secondary lines, abolishing of unnecessarily circuitous routes for freight movements; improved handling of less-than-carload traffic; coordination of transportation services and facilities by establishment of through routes and joint rates with other forms of transportation; and modernization of the freight-rate structure, including revision of below-cost freight rates to levels that cover cost and yield some margin of profit as well as adjustment of rates excessively above cost to attract traffic and yield more revenue." (Sen. Report No. 1647, 85th Cong., 2nd session, p. 11.)

Thus, the incidental references to the managerial function contained in the opinion below must be considered in the context of the specific legislative purposes embodied in the unique structure of federal and state regulatory law in the railroad industry. The broad impact on the entire field

of labor-management relations which the ORT purports to find in the opinion below is without foundation.

2. The ORT's assertion that the opinion below tends to establish federal courts as arbiters of "bargainability" reflects a profound misunderstanding of the limited use for which the Court cites *N. L. R. B. v. Borg-Warner*, 356 U. S. 342 (1958). The concept of a dispute not within the scope of the duty to bargain is not borrowed from the Labor Management Relations Act. That concept derives inevitably from the decisions of this Court construing the relationship between the Railway Labor and Norris-LaGuardia Acts. *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952); *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949); *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944). In the light of these cases, it could not be argued that a duty would be imposed on a carrier to bargain on a demand to abolish all positions occupied by members of a particular racial group. Nor could the refusal of the carrier to bargain on an illegal demand of this character give rise to a lawful strike. Thus, the concept of "the scope of mandatory bargaining", if not the precise phraseology, is contained in these cases. Because the *Borg-Warner* case does in fact contain appropriate language to express this concept, the Court of Appeals found it useful to cite that case for this purpose.

3. It is asserted that this case "presents a revival of the historic abuses of the judicial processes against which the Norris-LaGuardia Act was directed". The ORT's extreme rhetorical claims ignore the pronouncements of this Court concerning the need for accommodating the provisions of that Act with the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, 353 U. S. 30, 42 (1957); *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 (1937).

The Negro discrimination cases clearly establish the existence of issues concerning which Norris-LaGuardia offers no bar to judicial relief against the realization of illegal purposes. The *North Shore, Missouri Pacific*, and *Terminal Railroad* cases also establish the illegality of efforts to utilize the collective bargaining provisions of the Railway Labor Act to vitiate the exercise of legitimate state regulatory authority. The facts before the Court of Appeals demonstrate that the dominant, if not exclusive, purpose of the threatened ORT strike was to render ineffective and inoperative the orders of the state commissions. In these circumstances, the decision of the Court of Appeals reflects an accommodation of the Norris-LaGuardia, Interstate Commerce, and Railway Labor Acts which is fully supported by judicial authority. See *Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114 (6th Cir. 1957), cert. denied, 355 U. S. 877 (1958); *Norfolk and Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. denied, 355 U. S. 914; and, generally, Note, *Accommodation of the Norris-LaGuardia Act to other Federal Statutes*, 72 Harv. L. Rev. 354 (1958).⁸

Nor can it be suggested that North Western, in refusing to concede the validity of the ORT's demand, failed to fulfill any obligation imposed by law to attempt to achieve

8. The Norris-LaGuardia issue is also raised by the Railway Labor Executives' Association ("RLEA") in its proposed *amicus* brief. This Court has previously had the opportunity to consider the contentions and the authorities presented by the RLEA. With the single exception of its citation of *California v. Taylor*, 353 U. S. 553 (1957), all of the authorities cited by the RLEA were also cited and discussed with identical argumentation in the petition for certiorari filed by the same counsel in the *New York Central* case. In ascribing an absolute primacy to Norris-LaGuardia the RLEA has again chosen to ignore the admonition of this Court in *Chicago River and Virginian Ry.* with respect to the need for the accommodation of these statutes, as well as the accommodations effected by this Court in the *Howard, Graham, and Steele* cases.

agreement with regard to the more general subject matter which might have been implied by the demand. The record shows the continuing, but unsuccessful, effort by North Western to discuss arrangements intended to cushion the economic impact of the state commission orders on any employees affected (See point 2 in Statement, p. 5 above). The refusal of the ORT to discuss any proposal other than its original demand reflects its unyielding determination to block the operation of state commission orders through a strike arising from a failure to reach agreement on the original demand itself.

III.

The Judgment of the Court of Appeals Is Fully Supported by Additional Grounds Which the Court Did Not Find It Necessary to Reach.

Additional grounds presented to, but not reached by, the Court of Appeals also exist to support its judgment. North Western has contended that the ORT's demand is barred by the moratorium clauses of the National Agreement in effect between the parties; and that issue, involving the application or interpretation of an existing labor agreement, was submitted by North Western to the Adjustment Board. The submission was docketed by, and is pending before, the Board. This Court squarely held in *Chicago River* that the Norris-LaGuardia Act does not bar injunctive relief against a threatened strike which unlawfully seeks to substitute self-help with respect to a minor dispute subject to the jurisdiction of the Adjustment Board.

IV.

The Challenge to the Jurisdiction of the District Court Is Without Substance.

The ORT has chosen to urge in this Court for the first time a jurisdictional issue which was neither argued nor decided in the courts below. The basis for its position that this issue is now ripe for decision by this Court is an edited quotation from a footnote in Mr. Justice Rutledge's opinion in *Brotherhood of Railroad Trainmen v. Toledo, Peoria and Western Railroad Company*, 321 U. S. 50 (1954) at p. 54. The language in the petition (p. 36) is as follows:

"No jurisdiction can be predicated upon § 1331 of the Judicial Code for the reasons stated by Mr. Justice Rutledge in this language: 'the cause of action is one merely for the exercise of the general police power in the protection of the railroad's property. The complaint *** does not specify any provision of the federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act [and the Railway Labor Act] *** cf. *Cohens v. Virginia*, 6 Wheat. 264; *Norton v. Whiteside*, 239 U. S. 144; *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Gulley v. First National Bank*, 299 U. S. 109.' "

Justice Rutledge's actual words are (the emphasized words being those omitted from the petition):

"*Petitioners say jurisdiction is lacking since the cause of action is one merely for exercise of the general police power in the protection of the railroad's property. The complaint, it is said, does not specify any provision of federal law which requires construction or application and does no more than aver a general reference to federal statutes, including the Interstate Commerce Act and the statute making criminal specified interferences with interstate railroad property.* 18 U. S. C. § 412(a); cf. *Cohens v. Virginia*, 6 Wheat. 264; *Norton v. Whiteside*, 239 U. S. 144; *Niles-Bement-*

Pond Co. v. Iron Moulders Union, 254 U. S. 77; *Gully v. First National Bank*, 299 U. S. 109."

Characterization of this kind of use of authorities is best left to the court which is thus imposed upon. It is enough for us to note that "the reasons stated by Mr. Justice Rutledge," did not purport to be his reasons at all; and that the reference to the Railway Labor Act is sheer invention.

Jurisdiction in this proceeding is alleged in the complaint as based primarily on Sections 1331, and 1337 of the Judicial Code, the Railway Labor Act, and the Interstate Commerce Act (App. 5). The existence of federal jurisdiction in these circumstances was recognized in *Brotherhood of Railroad Trainmen v. New York Central Railroad Company*, 246 F. 2d 114 (1957), cert. denied, 355 U. S. 877 (1958).

The jurisdictional allegations in this case are virtually identical with those in *Chicago River*. In that case, where diversity was lacking, the power of the federal judicial system to achieve any necessary accommodation of Norris-LaGuardia and other Congressional policies was not left to the fortuities of the residence of the parties.

CONCLUSION.

For the reasons hereinabove stated, the ORT's petition, and the RLEA's motion for leave to file a brief *amicus curiae* in support thereof, should be denied.

Respectfully submitted,

CARL McGOWAN,
JORDAN JAY HILLMAN,
Attorneys for Respondent,
400-West Madison Street,
Chicago 6, Illinois.

EDGAR VANNEMAN, JR.,
ROBERT W. RUSSELL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

N [REDACTED] 100

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

**PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION TO CERTIORARI.**

ALEX ELSON,
LESTER P. SCHOENE,
1625 K Street, N.W.,
Washington 6, D. C.,

Attorneys for Petitioners.

BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958.

No. 984

**THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,**

Petitioners,

vs.

**CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,**

Respondent.

**PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION TO CERTIORARI.**

*To the Honorable, the Chief Justice of the United States
and the Justices of the Supreme Court of the United
States:*

Respondent's brief in opposition amounts to a confession of error on the part of the Court of Appeals. That court held flatly that the proposal made by the Union in its Section 6 notice was "completely outside the ambit of 'rates of pay, rules, or working conditions'", 264 F. 2d at 260, and hence did not give rise to a labor dispute as that term is used in the Railway Labor Act and the Norris-LaGuardia Act. The brief in opposition abandons that position en-

tirely. The Railroad now maintains: (1) relying on the untenable secondary theory of the Court of Appeals, that the proposed subject of bargaining was illegal because of the orders of two state regulatory commissions; and (2) without any support in the proceedings below, that, while there was a labor dispute, it was a "minor" dispute concerning the terms of an existing agreement. The brief in opposition neither meets nor refutes the substantial questions presented by the Petition for Certiorari. On the contrary, by formulating new and hypothetical questions for decision by this Court, partly—in an effort to shore up the decision of the Court of Appeals by adducing far-fetched grounds which were not considered by that court—the Railroad has succeeded only in underscoring the need for a resolution by this Court of the questions presented by the Petition for Certiorari.

I.

The Orders of the Regulatory Commissions of South Dakota and Iowa Cannot Alter the Obligation of the Railroad With Respect to Collective Bargaining Under the Railway Labor Act.

No state law and no order of any state regulatory commission conflicts with the duty of the Railroad to bargain concerning the proposal made in the Section 6 notice. Not even the South Dakota order in its final form purported to do more than approve the Railroad's request for permission to abandon certain stations.* The respondent ac-

* "Accordingly we deem it desirable to clarify, and we hereby amend our Findings and Order so as to eliminate and modify any statement therein which may be construed as an adjudication of the validity of or an interpretation or application of any labor agreement, or as a directive to violate any contract which may in fact exist or to circumvent the Railway Labor Act in connection with the execution of our Order, * * *." (R. 215.)

"Correctly construed the Commission's Order does not conflict

knowledges on pages 13 and 15 of its Brief in Opposition that both orders were permissive and not mandatory. There could, therefore, be no conflict between those orders and a collective bargaining agreement resulting from the Section 6 notice.

It is true that there is an area within which valid state regulation is not displaced by the process of collective bargaining. Conflicting state regulation of interstate railroad operations has been sanctioned by this Court, however, only where it can be shown clearly to relate to health or safety. See *Terminal Railroad v. Trainmen*, 318 U. S. 1, 6-7 (1943). And even where state regulation is concerned with health or safety it may be subordinated to national policy. See *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). The Railroad has suggested, and can suggest, no reason why the regulatory commissions of two states should be conceded power to determine, without reference to considerations of health or safety, questions relating to rates of pay, rules, and working conditions—questions which national policy has committed to the process of collective bargaining.

The Railroad suggests that on this score the opinion of the Court of Appeals is supported by its own prior decision in *In re Chicago & North Shore and M. R. Co.*, 147 F. 2d 723, 727 (7th Cir., 1945), cert. denied 325 U. S. 852.* Whatever force this assertion might have had is necessarily dissipated by the decision of the Seventh Circuit in the

with the Railroad Labor Act. The requirement in the Order for a progress report after the expiration of 120 days opened the door to any contingency which may arise including negotiations, strike, federal intervention, proceedings before the Mediation Board, Adjustment Board, or otherwise, in putting the Central Agency Plan into effect." (R. 335.)

* This was a proceeding in bankruptcy involving construction of certain intercorporate agreements and orders of the bankruptcy court. In so far as the case deals with the Railway Labor Act it holds merely that the Act does not apply to a dispute between employees of a local interstate railway, not subject to the Act, and employees of an interstate carrier.

case of *Taylor v. Fee*, 235 F. 2d 251 (7th Cir., 1956), affirmed by this Court in *California v. Taylor*, 353 U. S. 553 (1957).

Passing the point that the Court of Appeals apparently did not cite that case in support of its holding that state regulation supersedes the provisions of the Railway Labor Act, but rather in support of its strange theory that the subject of the Section 6 notice was not within the scope of "mandatory" bargaining under the Act, we simply observe that the Railroad's somewhat desperate efforts to draw comfort from the denial of certiorari in that case are, of course, as futile as the effort to sustain the decision of the Court of Appeals by citation of its own prior decision.

The Railroad operates in nine states. R. 5. As shown by the opinion of the Court of Appeals, 264 F. 2d at 256, the Railroad applied to the regulatory commissions of four of these states for permission to abandon certain stations. Two of these—South Dakota and Iowa—granted the requested permission. Taking these orders at their maximum possible value, they could affect the negotiations about some—not all—of the jobs held by telegraphers in the two states only. The Union's Section 6 notice related to all positions in all states in which the Railroad operated. The Iowa and South Dakota orders affected only station agent positions in those states. They had no relevance to the question of job security for employees of respondent represented by the Union employed in other states nor in positions in Iowa and South Dakota other than in stations to be abandoned under the Central Agency Plans. The dragnet decision of the Court of Appeals enjoined a strike over a dispute relating to job tenure for telegraphers generally notwithstanding the narrow scope of the orders of the regulatory commissions in only two of the states involved.

II.

The Decision of the Court of Appeals Cannot Be Sustained on the Ground That the Labor Dispute Involved Was a "Minor" Dispute.

Not even a colorable factual basis for the contention that what was involved in this litigation was a "minor" dispute was in existence until *after* the District Court had granted a temporary restraining order. Finding 13, R. 355. The District Court held clearly and correctly that it was a major dispute and not a minor dispute. Finding 21, R. 357, Conclusion 3, R. 358. The Court of Appeals did not reach the question, holding instead that there was no labor dispute—no dispute relating to rates of pay, rules, or working conditions—at all. The effort of the Railroad to resurrect this belated and rejected contention, not relied on by the Court of Appeals, underscores the insupportability of its opposition to the Petition for Certiorari.

III.

The Question as to the District Court's Jurisdiction Is a Substantial One Which Should Be Determined by This Court.

The Respondent's position with respect to the jurisdictional issue is an evasive one, designed to obscure the importance of a fundamental question relating to the distribution of judicial power between the state and federal courts. The Respondent well knows that the fact that the question is urged here for the first time is not a reason why it should not be considered—that, in fact, such a question might well be raised by the Court on its own motion. The easy assumption that there is "power [in] the federal judicial system to achieve any necessary accommodation

of Norris-LaGuardia and other Congressional policies" (Brief in Opposition, p. 22) ignores the fact that federal jurisdiction must in the first instance be predicated on the provisions of Article III of the Constitution and the implementing Acts of Congress. The Norris-LaGuardia Act is but a further limitation of jurisdiction thus conferred.

The quotation in our petition purported to be no more than the statement by the Court of the question which it specifically left open in the *Toledo* case. *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 54-55, n. 5 (1944). The inserted reference, clearly labeled as such by the brackets, was derived from the record in that case. The complaint in *Toledo* made reference to four federal statutes, one of which was the Railway Labor Act. See Record, pp. 4, 5, 9; No. 28, O. T. 1943. In that case, as in this one, the complaint contained only a general statement that it arose under the Constitution and laws of the United States without specifying any federal statute as the basis for its claim. *Id.* at 28.

Again the facts are that the question of jurisdiction presented by that case and this one is still unresolved by this Court. The only authority relied upon by Respondent is *Brotherhood of Railroad Trainmen v. New York Central Railroad Co.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied, 355 U. S. 877 (1958). The case rested in turn on the lower court opinion in the *Toledo* case, 132 F. 2d 265, 268-270 (C. A. 7, 1942), as the basis for establishing jurisdiction. *Id.* at 121-122. As Judge, now Mr. Justice, Stewart in dissenting said at page 122:

"In my view federal jurisdiction does not exist in this case. Citizenship of the parties is not diverse. The controversy certainly does not arise under the Constitution, and I cannot perceive that it arises under the laws of the United States. Believing that the complaint should be dismissed for want of federal jurisdiction, I do not reach the merits."

Respondent has not only failed to establish any federally created right as the basis for the jurisdiction of the federal courts in its brief in opposition: it has substantially shifted to the argument that its rights derive from the State regulatory commission orders. See Brief in Opposition, pp. 9-16. No jurisdiction exists in the federal courts to entertain this action. It is important that this Court speak to that question.

Conclusion:

The efforts of the Respondent to obscure and minimize the seriousness of the errors of the Court of Appeals are futile. That court, by holding that no labor dispute is involved here, and that the permissive orders of two state regulatory commissions can frustrate the process of collective bargaining which is the cornerstone of national policy in the regulation of railway labor problems, has set at naught the Norris-LaGuardia Act and threatened a resurgence of all the evils of government by injunction. The writ of certiorari should be granted and the judgment reversed.

Respectfully submitted,

ALEX ELSON,
LESTER P. SCHOENE,

1625 K Street, N.W.,
Washington 6, D.C.,

Attorneys for Petitioners.

BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,

Of Counsel.

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Supreme Court of the United States

October Term, 1959

**The Order of Railroad Telegraphers, et al.,
Petitioners**

v.

**Chicago and North Western Railway Company,
Respondent**

**On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit**

**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION AS AMICUS CURIAE**

**CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio**

**EDWARD J. HICKEY, JR.
JAMES L. HIGHAWAY, JR.
620 Tower Building
Washington 5, D. C.**

*Counsel for Railway Labor
Executives' Association*

Of Counsel:

**MULHOLLAND, ROBIN & HICKEY
620 Tower Building
Washington 5, D. C.**

November, 1959

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 100

THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,
Petitioners

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**BRIEF OF RAILWAY LABOR EXECUTIVES'
ASSOCIATION AS AMICUS CURIAE**

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition of The Order of Railroad Telegraphers, et al., that the judgment of the Court of Appeals be reversed. The consent of the attorneys for both the petitioners and the respondent has been obtained and is sub-

mitted herewith in accordance with Rule 42 of the Court's Rules.

THE INTEREST OF THE ASSOCIATION

The Railway Labor Executives' Association is a voluntary unincorporated association located in Washington, D. C., with which are affiliated twenty-three standard national and international railroad labor organizations that are the duly authorized representatives of more than 90 percent of the nation's rail employees under the Railway Labor Act. (45 U.S.C.A. 151 et seq.). The names of these individual organizations are:

American Railway Supervisors' Association

American Train Dispatchers' Association

Brotherhood of Locomotive Engineers

Brotherhood of Locomotive Firemen and
Enginemen

Brotherhood of Maintenance of Way Employees

Brotherhood of Railroad Signalmen

Brotherhood of Railroad Trainmen

Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station
Employees

Brotherhood Railway Carmen of America

Brotherhood of Sleeping Car Porters

Hotel & Restaurant Employees and Bartenders
International Union

International Association of Machinists

International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers

International Brotherhood of Electrical Workers

International Brotherhood of Firemen & Oilers

International Organization Masters, Mates &
Pilots of America

National Marine Engineers' Beneficial
Association

Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Sheet-Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

This Court has heretofore recognized the Association as a proper party to appear and speak for these organizations and their member employees. *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al. v. United States*, 355 U.S. 141 (1957).

The Association and the individual organizations of which it is composed have a substantial interest in this case because the decision of the Court of Appeals, if left standing, will seriously restrict collective bargaining under the Railway Labor Act and will leave the employees represented by the organizations affiliated with the Association at the mercy of their railroad employers. Practically all of the individual labor organizations affiliated with the Association are parties to notices filed with railroads under the Railway Labor Act proposing agreements for the stabilization of employment similar to the notice involved in the present litigation. Moreover, the effect of the decision below is much more far sweeping than to simply forbid railway labor organizations from pursuing negotiations on such notices. The decision imposes restrictions on the commands of the Railway Labor Act that employees and carriers exert reasonable efforts to settle "all disputes" between them in conference and substitutes the Federal courts as the

arbiters of what disputes may or may not be settled by such negotiations. The decision also holds that state agencies may grant a railroad permissive authority which will bar collective bargaining under the Railway Labor Act. This constitutes a novel and disastrous limitation on the Federal statute, which substantially affects the interest of the constituent organizations of the Association and the employees they represent.

The Court in its order of October 12, 1959, granting the petition for certiorari recognized the interest of the Association and the employees represented by its constituent organizations in this case by granting the motion of the Association to file a brief *amicus curiae* in support of such petition.

QUESTIONS PRESENTED

The petition for certiorari in this case raised eight issues affecting the validity of the Court of Appeals decision. The Association in this brief will concern itself only with three of those issues. These are:

1. Did the Court of Appeals err in holding that a railroad may properly refuse under the Railway Labor Act to confer, consider, and exert every reasonable effort to settle through collective bargaining a request by representatives of its employees for the negotiation of an agreement to stabilize the level of employment?
2. Did the Court of Appeals err in holding that the requests for such an agreement did not give rise to a "labor dispute" within the meaning of the Morris-LaGuardia Act and that such Act did not forbid the issuance of an injunction in this case?
3. Did the Court of Appeals err in holding the subject-matter of collective bargaining under the

Railway Labor Act may be limited by permissive orders of state regulatory commissions?

SUMMARY OF ARGUMENT

I

A. The court below held that the proposal of the petitioners was outside the scope of mandatory bargaining under the Railway Labor Act and therefore the Union could be enjoined from attempting to strike in order to require the Railroad to confer with it on this proposal. Such decision was based upon the conclusion that collective bargaining under the Railway Labor Act, where grievances or disputes concerning the interpretation or application of agreements are not involved, is limited to matters concerning "rates of pay, rules, or working conditions" and that petitioners' proposal did not fall within such classification of subject-matter. In reaching this conclusion the court below relied upon precedents under the Labor-Management Relations Act of 1947 and its own convictions as to what is good or bad for the railroad industry. The court gave no consideration to the language of the Railway Labor Act or to the legislative history of that statute. Consideration of these key factors leads to the conclusion that the court below was in error. Section 2, First and Second of the Railway Labor Act places a duty upon carriers and their employees to confer and to exert every reasonable effort to settle by voluntary negotiations in conference "*any dispute*" without limitation as to subject-matter. The language of Section 5, First of the Railway Labor Act recognizes three classes of disputes. These are (a) disputes concerning rates of pay, rules, and working conditions; (b) disputes con-

cerning grievances or the interpretation or application of agreements which are referable to the National Railroad Adjustment Board; (e) any other dispute without limitation as to subject-matter. Thus, the statute in plain and unambiguous language refutes the limitations placed upon bargaining thereunder by the decision below. By well recognized rules of statutory construction, this language should be given effect, particularly since the statute is a remedial one requiring a liberal and broad construction.

B. The conclusions to be derived from the language of the Railway Labor Act are fully supported by a reference to its legislative history. The requirement of Section 2 that *all disputes* be settled, if possible, in conference between carriers and employees is derived from Section 301 of the Transportation Act of 1920. The legislative history of that Act indicates that it was intended to cover any and all disputes without limitation as to subject-matter. The report of the Conference Committee on such legislation states that it directs conferences over "*all matters of dispute*". This language was continued in Section 2 of the Railway Labor Act of 1926 and the reports of the committees of Congress on such legislation clearly show that it covers "*all disputes*" without limitation as to subject-matter. The report of the House Committee on Foreign and Interstate Commerce specifically states that the Act recognizes and covers the three classes of disputes set forth above and further states that "*all disputes must be considered first in conference*" specifically referring to the three classes outlined, which include "*all other disputes*" not embraced within the other classifications. The report of the Senate Committee on Interstate Commerce states that "*any and all disputes*" must be considered

in conference between the parties. In addition, the language of Section 5, First of the 1926 statute specifically sets forth three classes of disputes including in class (e) "all other disputes" not embraced in the other two classifications. These provisions of the Railway Labor Act remained unchanged in the amendments of 1934. The impact of this legislative history is highlighted by the fact that the 1926 Railway Labor Act was drafted by a joint management-labor committee and was presented to the Congress as providing a framework within which carriers' and their employees could "settle their affairs at home and adjust all their differences between themselves".

C. The other reasons advanced by the court below in support of its decision are equally erroneous. The court stated that the present case is governed by the *Graham*, *Howard*, *Steele*, and *Tunstall* decisions and that it could "see no material difference between the *Howard* case and the case before us." It is clear that the cited cases have nothing to do with the question of whether the Railway Labor Act limits the subject-matter of collective bargaining. They merely hold that whatever the subject-matter of the bargaining may be, the representative of the employees must use its bargaining authority so as not to improperly discriminate against parts of the craft or class which it represents. The court below also based its decision in large part on its belief that it would be undesirable for the carriers in the railroad industry to be required to bargain on matters such as are contained in the petitioners' proposal for an agreement concerning the stabilization of employment. This action of the court substitutes its own judgment of what constitutes the public interest for that set forth by Congress in the statute. The legal impropriety of this substitution of

judical judgment for the intent of Congress is given emphasis by the fact that the opinion of the court below makes no reference whatsoever to the language of Section 2 of the Railway Labor Act from which is derived the duty to bargain or to the legislative history of the Act. Thus, the two basic tenets for the interpretation of a statute, i.e., the language of the statute and its legislative history, are completely ignored by the court below in favor of an interpretation based upon its own concepts of what is good or bad for the railroad industry. This is obviously an improper basis for interpreting the scope of the Railway Labor Act. However, if there is to be judicial inquiry into such policy factors then it should include consideration of the effects which the limitation imposed by the decison below will have upon collective bargaining under that statute. There can be no doubt but that the primary purpose of Congress in enacting the statute was to avoid interruptions to interstate commerce by providing a framework of voluntary negotiation, mediation and either arbitration or fact finding to settle all disputes which might arise within the railroad industry. The decision below will substitute for this framework the long discarded principle of regulation by injunction and will place the carriers in a position where they can hinder and destroy effective collective bargaining by requiring the employee representatives to go through protracted and expensive litigation in order to even get to the conference table.

II

Assuming *arguendo* that the duty to confer and settle disputes in conference under the Railway Labor Act, other than with respect to matters covered by

Section 3 of the statute, is limited to matters concerning "rates of pay, rules, or working conditions", petitioners' proposal to negotiate an agreement concerning stabilization of employment is within the ambit of such a classification. Petitioners' proposal specifically requested the negotiation of a "rule". This term is peculiar to the Railway Labor Act and does not appear in the National Labor Relations Act, as amended. The rules agreements between carriers and employees cover a multitude of matters which place restrictions on a carrier's common law freedom with respect to discipline, discharge, promotion, transfer, or other actions affecting employees or their jobs. Such rules have also embraced agreements relating to stabilization of employment, including agreement to preserve existing levels of employment against changes arising out of installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, and relocation of maintenance and repair work. While the court below states a correct general principle of law that the provisions of the statute cannot be changed by existing agreements, such principle has no application in this case. The existence of such agreements is clear evidence of the manner in which the statute has been applied within the industry and should be given appropriate weight in the interpretation of the particular statutory language here discussed.

The court below based its decision that the petitioners' proposal was not included within the language "rates of pay, rules, or working conditions" in large measure on its belief that technological change in the railroad industry would be retarded if carriers were

required to confer and bargain about such matters. However, this Court has recognized that the normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce requests for negotiation of agreements relating to the use of labor saving devices which will displace members. In addition, the many decisions of the courts dealing with the phrase "working conditions" clearly indicate that petitioners' proposal is a proper one for collective bargaining.

III

The decision below also holds that the proposal of the petitioners for the negotiation of an agreement concerning stabilization of employment does not give rise to a "labor dispute" within the meaning of the Norris-LaGuardia Act so that the prohibitions of that statute against injunctions by Federal courts in labor disputes is not applicable. However, the decisions of this Court relating to the scope of the Norris-LaGuardia Act make clear that "labor disputes" thereunder are not limited to matters such as wages, hours, unionization or betterment of working conditions, but rather the term must be given a broad and liberal interpretation in light of the purposes of the statute. This construction of the Norris-LaGuardia Act, when considered in conjunction with the factors bearing upon the scope of the term "rules or working conditions" as used in the Railway Labor Act, clearly reveals that petitioners' proposal gave rise to a "labor dispute" within the meaning of the former statute so that the Federal courts are prohibited from enjoining a strike to induce bargaining upon that proposal.

IV

The decision below holds in substance that the field of bargaining under the Railway Labor Act may be limited by decisions of state regulatory commissions granting a carrier's petition for authority to make changes in its operations. Not only do the commissions here involved disclaim an intent to interfere with bargaining under that Act, but the decision of this Court in *California v. Taylor*, 353 U.S. 533, as well as other judicial decisions, makes clear that the Railway Labor Act is supreme in the area covered by the statute and that the duties and obligations imposed by it upon carriers and employees cannot be limited by the principle of state sovereignty.

ARGUMENT

I

THE RAILWAY LABOR ACT REQUIRES A CARRIER TO CONSIDER, CONFER UPON, AND TO MAKE EVERY REASONABLE EFFORT TO SETTLE BY NEGOTIATIONS ALL DISPUTES, WITHOUT LIMITATION AS TO SUBJECT-MATTER, WHICH MAY ARISE WITH ITS EMPLOYEES.

- A. The plain unambiguous language of the statute requires a carrier and its employees to exert every reasonable effort to settle any dispute by negotiation without limitation as to subject-matter

The Court of Appeals held that the issue in this case is whether the request of The Order of Railroad Telegraphers (hereinafter called "the Union") to the Chicago & North Western Railway (hereinafter called "the Railroad") for the negotiation of an agreement relating to the level of employment of crafts or classes of the carrier's employees represented by the Union is within the scope of mandatory bargaining under the Railway Labor Act. It further held that the answer to this issue depended upon whether such a request pertains to "rates of pay, titles, or working conditions". The court concluded that the

request was not embraced within such classification of subject-matter and thus was not within the scope of mandatory bargaining under the governing statute. The carrier was therefore not required to negotiate with respect to this request and the Union could be enjoined from striking to require such negotiations (R. 382-384).

The Court of Appeals reached these conclusions upon the basis of decisions relating to the interpretations of the Labor-Management Relations Act of 1947 (29 U.S.C.A. 141 et seq.) and without reference to the provisions of the Railway Labor Act (45 U.S.C.A. 151 et seq.) which governs labor relations in the railroad industry.¹ A review of the language of the Railway Labor Act clearly reveals that there is no limitation upon collective bargaining under that statute and that the holding of the Court of Appeals is in error.

Section 2 of the Railway Labor Act (45 U.S.C.A. 152) sets forth certain general duties of carriers and employees under the statute. The first two paragraphs of this Section place a specific duty upon carriers and employees to settle all disputes between them in the following language:

"General duties—Duty of carriers and employees to settle disputes"

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agree-

¹ Although the Court of Appeals stated (R. 382) that this Court had put limitations on the scope of bargaining under the Railway Labor Act, it cites only a decision under the Labor-Management Relations Act for this proposition.

ments concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (Emphasis supplied)

"Consideration of disputes by representatives

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Emphasis supplied)

Thus, the statute in plain and unambiguous language requires a carrier to confer and consider in good faith with representatives of its employees all matters of dispute between them and to exert every reasonable effort to settle such disputes without any limitation as to the subject matter involved. The purpose of this broad requirement is stated by the statute to be the avoidance of any interruption to commerce or to the operations of a carrier. The decision of the Court of Appeals places a limitation upon this plain language of the statute and in effect says that carriers and employees are required by it to confer and exert every reasonable effort to settle only disputes concerning "wages, rules, or working conditions" as those terms may be defined by the courts. This action is contrary to the long-established principle of statutory construction that courts follow the clear language of statutes. This principle was

stated by this Court as follows in *United States v. Public Utilities Commission*, 345 U.S. 295, 315 (1953):

"Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075; *Feres v. United States*, 340 US 135, 95 L ed 152, 71 S Ct 153; *International L. & W. Union v. Juneau Spruce Corp.*, 342 US 237, 243, 96 L ed 275, 280, 72 S Ct 235; *Johansen v. United States*, 343 US 427, 432, 96 L ed 1051, 72 S Ct 849."

Here both the language of the statute and the purpose of Congress in using that language (i.e. to avoid interruptions to commerce) are unequivocally clear. The decision of the Court of Appeals thus constituted an unwarranted limitation upon the statutory language. This is particularly true since the Railway Labor Act is remedial in nature and should be broadly and liberally construed to accomplish the purposes it was designed to meet as thus set forth in Section 2, *Nashville, C. St. L. Ry. v. Railway Employees' Dept., etc.*, 93 F. 2d 340, 342 (6th Cir., 1937), cert. den. 303 U.S. 649; *Black v. Magnolia Liquor Co.*, 355 U.S. 24 (1957). In the latter case this Court stated as follows on this point: (355 U.S. at 26)

"But we deal here with remedial legislation whose language should be given hospitable scope."

These conclusions as to the scope of the language of Section 2, First and Second, are enforced by reference to the provisions of the fifth paragraph of that Section as contained in the 1934 statute which was subsequently revised by the provisions of paragraph eleven enacted in 1951. Section 2, Fifth as it was adopted in the 1934 statute reads as follows:

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

The fact that Congress felt it necessary to put a specific limitation in the 1934 statute covering so-called "yellow dog" contracts and "union shop" agreements is clearly indicative of the fact that Congress intended and understood that the provisions of the first two paragraphs were all-inclusive. This provision further demonstrates that when Congress wished to put any limitation upon the provisions of the first two paragraphs of that Section it specifically did so.²

The decision below gives no evidence that any consideration was given to the provisions of Section 2 of the Railway Labor Act which defines the duty of carriers and employees to bargain. It is apparent that the Court of Appeals considered this duty (outside of disputes arising under Section 3) as only co-extensive with the provisions of Section 6 (45 U.S.C.A.

²The prohibition against union shop agreements was removed in 1951 by Section 2, Eleventh.

156) relating to proposed changes in agreements "affecting rates of pay, rules, or working conditions". (R. 382) However, a reference to Section 5 of the statute (45 U.S.C.A. 155) clearly reveals that Section 6 cannot be read as a limitation upon the subject-matter embraced within the duty to bargain found in Section 2, First and Second.

The first paragraph of Section 5 reads in pertinent part as follows:

"Functions of Mediation Board—Disputes within jurisdiction of Mediation Board"

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference."

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." (Emphasis supplied)

This paragraph thus recognizes three separate classes of disputes which may arise between a carrier and its employees with respect to two of which either may invoke the services of the Board. These are (1) disputes concerning rates of pay, rules, or working conditions; (2) disputes concerning the interpretation or application of agreements which are referable to the National Railroad Adjustment Board; (3) *any other dispute*. No limitation as to subject-matter is placed upon this third classification of disputes.

These conclusions drawn from the language of Sections 2 and 5 of the Railway Labor Act are further supported by reference to provisions of Section 7 (45 U.S.C.A. 157) providing for voluntary arbitration of disputes. Section 5, First of the statute provides that if the National Mediation Board is unable to bring about an amicable settlement through mediation of any dispute before it, which as shown above includes any dispute not referable to an adjustment board, it shall endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of Section 7. The first paragraph of that Section contains the following language defining the matters which may be submitted to arbitration thereunder:

“First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.”

As can be seen, the language of the Section is all-inclusive and does not contain any limitation as to the subject-matter which may be arbitrated except that it shall involve a controversy which has not been settled in conference between the parties, by an adjustment board or through mediation.

The Court of Appeals therefore clearly erred when it held that the request of the Union was not a proper subject for bargaining under the Railway Labor Act because it did not involve rates of "pay, rules, or working conditions". The statute by its own language contemplates valid disputes not falling within this classification with respect to which the parties are required to confer and make every reasonable effort to settle. It makes no difference under the Railway Labor Act whether the dispute concerns "rates of pay, rules, or working conditions" or some subject-matter not embraced by those terms. In either case the duty of bargaining rests on the carrier and its employees.

The decision below also proceeded from an assumption that the scope of bargaining under the Railway Labor Act is the same as that under the Labor-Management Relations Act of 1947. (R. 382) However, an examination of the language of the latter statute clearly shows that it differs from the Railway Labor Act with respect to such matters. The requirement of collective bargaining in the Labor-Management Relations Act of 1947 is based on provisions in Sections 8 and 9 thereof. Section 8(a)(5) and (d)³ makes it an "unfair labor practice" for an employer to refuse to bargain collectively with representatives of his employees with respect to "wages, hours, and other terms and conditions of employment" subject to the provisions of Section 9(a).⁴ The latter Section in turn makes the representatives selected by a majority of employees in an appropriate unit the exclusive representative for bargaining in respect to such matters. Whatever may be the correct interpretation

³ 29 U.S.C.A. 158(a)(5) and (d).

⁴ 29 U.S.C.A. 159(a).

of these provisions, the Labor-Management Relations Act of 1947 does not contain the specific all-inclusive directive laid down by Congress in Section 2 of the Railway Labor Act requiring carriers and employees to confer, consider, and exert every reasonable effort to settle "all disputes". The need to avoid interruptions to the instruments of commerce, as set forth by Congress in the Railway Labor Act, and the recognition of the differences between the rail and air transport industries on the one hand and other types of industry has led Congress to set up a statute to govern labor-management relations in the transport industries that differs completely in concept and method from that employed to regulate such relations in other industries. *Brotherhood of Railroad Trainmen v. Chicago, River & Indiana R. Co.*, 353 U.S. 30, 31-32, N. 2. (1957)

The Railway Labor Act must therefore be taken as meaning what it says when it directs carriers and employees to exert every reasonable effort to settle through negotiations all disputes arising between them and not just some disputes as the Court of Appeals has held.

B. The legislative history of the Railway Labor Act reveals that Congress intended to embrace all disputes, without limitation as to subject-matter, in the requirements that carriers and their employees make every reasonable effort to settle differences by negotiation.

The legislative history of the regulation of labor-management relations in the railroad industry is the story of a fifty-year search by Congress to devise an ever broadening framework to settle disputes within that industry leading to interruptions of interstate commerce. This search begins with the Act of October 1, 1888 (25 Stat. 501) providing for the

voluntary arbitration of "differences or controversies", which might hinder, impede, obstruct, interrupt, or affect the transportation of passengers or property and culminates with the passage of the Railway Labor Act of 1934 (45 U.S.C.A. 151 et seq.) which provided for the settlement through the processes of negotiation, mediation, and voluntary arbitration of *all disputes* other than grievances or disputes growing out of the interpretation or application of agreements and for the compulsory arbitration of the latter type of dispute if a negotiated settlement fails. In between successive legislative enactments have filled in the gaps.

The Erdman Act of June 1, 1898 (30 Stat. 424) employed the phrase "wages, hours, and conditions of employment", and provided for the Chairman of the Interstate Commerce Commission and the Commissioner of Labor to intervene and in substance mediate controversies concerning such matters. This statute also provided for voluntary arbitration.

The Newlands Act of July 15, 1913 (38 Stat. 103) continued the basic framework of the Erdman Act, but provided for a Board of Mediation and Conciliation to mediate controversies "concerning wages, hours of labor, or conditions of employment." This statute continued the traditional voluntary arbitration procedures.

The language of Section 2 of the present Railway Labor Act making it the duty of carriers and employees to negotiate with respect to "*all disputes*", without limitation as to subject-matter, first appeared in Section 301 of H.R. 10453, which was introduced in 1919 before the 66th Congress, 1st Session, as part of a proposed new transportation act removing railroads from war time government ownerships. The Senate

bill, S. 3288, 66th Congress, 1st Session, did not contain any comparable provision. The ultimate bill adopted, which became Section 301 of Part III of the Transportation Act of 1920 (41 Stat. 456) reads as follows:

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of *any dispute* between the carrier and the employees or subordinate officials thereof. *All such disputes* shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or the subordinate officials thereof, directly interested in the dispute. If *any dispute* is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." (Emphasis supplied)

The Conference Report on this legislation (Rept. 650, 66th Congress, 1st Session, dated February 18, 1920) leaves no doubt that this provision was intended to place a duty upon carriers and employees to negotiate out any dispute without limitation as to subject-matter. At page 60 of that Report, the Conference Committee states:

"The House bill makes it the duty of carriers and their employees to take *all possible means* to adjust their differences in the first instance before referring any dispute to any adjustment board. The Senate amendment had no provision upon this subject. The conference bill contains a declaration, similar to that in the House bill, directing the officials of a carrier and their

employees to appoint representatives to confer over *all matters of dispute.*" (Emphasis supplied)

The phrase "all matters", as used to refer to the statutory language "any dispute", cannot possibly be interpreted to mean that there was a limitation upon the subject-matter concerning which carriers and their employees were permitted and intended to negotiate.

This conclusion is also borne out by the Conference Report on the provisions of Title III of the 1920 statute. This report points out at page 59 that the House bill provided for adjustment boards which were authorized "to receive disputes of any kind for consideration" submitted to them. This was in keeping with the House bill which placed a duty in the first instance upon all carriers and employees to exert every reasonable effort to settle "any dispute" between them by conference. The Report also points out (page 59) that the Senate bill, which did not require negotiation of disputes, "divided disputes into two classes, those relating to wages and working conditions and those relating to grievances and matters of discipline." Regional adjustment boards were provided for settlement of the latter class of dispute, while a system of wage committees and a Labor Board were set up to decide wage disputes.

The final bill as adopted retained the House concept of a duty to negotiate upon "all disputes" and provided a compromise version of the Senate bill with respect to adjustment boards. Instead of authority to consider disputes of "any kind" submitted to them, such boards were limited to disputes "involving only grievances, rules, or working conditions", not decided in conference. A Labor Board was set up to review,

upon petition or its own motion, wage agreements voluntarily negotiated and disputes certified by adjustment boards likely to substantially interrupt commerce or disputes in cases where an appropriate adjustment board had not been organized.

The concept of a duty upon carriers and employees to confer upon and make every reasonable effort to settle "any dispute", without limitation as to subject-matter, has continued down to the present time. Statutory changes have related solely to the procedures with respect to government intervention when negotiations fail.

Thus, Section 2, First and Second of the Railway Labor Act of 1926 (44 Stat. 577) laid down a duty of collective bargaining in language identical to that presently found in such Section of the Act. This language, except for the first sentence of Section 2, First is substantially the same as that found in Section 301 of Title III of the Transportation Act of 1926. Sections 5, 6, 7, and 10 of the 1926 statute also set up in their present form the basic system of mediation, voluntary arbitration, and/or fact finding by Presidential Emergency Boards where collective bargaining fails to settle a dispute. Section 6 also appeared for the first time to prevent changes in existing agreements concerning wages, hours, and working conditions except as there provided. Section 3 also provided for adjustment boards to entertain and act upon disputes arising out of grievances or out of the interpretation or application of agreements, but made the organization of these boards a matter of agreement between the parties.

The reading together of Section 2, First and Second and Section 5, First of the 1926 statute makes

clear that the statute contemplated (1) a duty upon carriers and employees to confer upon and exert every reasonable effort to settle in conference "all disputes", without limitation as to subject-matter, (2) mediation through the auspices of the National Mediation Board of "all disputes", without limitation as to subject-matter, not settled in conference,⁵ and (3) finally arbitration and/or emergency board fact finding with respect to such disputes.

Section 2, First and Second of the 1926 Act read the same as such section in the present Act quoted above at page 12. Section 5, First of the 1926 Act read as follows:

"Section 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the board of mediation created by this Act, or the board of mediation may proffer its services, in any of the following cases:

"(a) a dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

"(b) a dispute which is not settled in conference between the parties in respect to changes in rates of pay, rules, or working conditions;

"(c) *any other dispute* not decided in conference between the parties." (Emphasis supplied)

⁵ If the dispute involved a grievance or grew out of the interpretation or application of an agreement and had been referred to an adjustment board, it was removed from the class of disputes covered by Section 5, First of the 1926 Act.

Any shred of doubt that could exist as to the scope of bargaining existing under the 1926 Act is removed by the Report of the House Committee on Foreign and Interstate Commerce on H.R. 9463, which became the Railway Labor Act of 1926. This Report (No. 328, 69th Cong., 1st Sess., dated February 19, 1926) read in pertinent part as follows: (page 3)

"The bill provides in brief as follows:

- "(1) It is made the duty of all railroad managers and employees to exert every reasonable effort to make and maintain agreements.
- "(2) *All disputes* shall be considered first in conference between representatives designated and authorized so to confer respectively by the carrier and by the employees thereof interested in the dispute.
- "(3) Representatives shall be designated in such manner as the parties themselves shall determine 'without interference, influence, or coercion exercised by either party of the self-organization or designation of representatives by the other.'
- "(4) Disputes between employers and employees are divided into *three classes*:
 - "(a) disputes over grievances or the interpretation or application of agreements;
 - "(b) disputes over proposed changes in agreements concerning rates of pay, rules, and working conditions;
 - "(c) *all other disputes*.
- "(5) *All disputes must be considered first in conference*, but if not settled in conference disputes in class b and c are considered directly by the Government board of mediation. Disputes in class a, if not settled in conference must be referred to an adjustment board and

are only considered by the board of mediation if not decided by the adjustment board. (Emphasis supplied)

- * * * *
- "(8) A board of mediation is created composed of five members appointed by the President by and with the advice and consent of the Senate, with the duty to intervene at the request of either party or on its own motion in any unsettled dispute, whether it be a (class *a*) dispute not decided in conference or by the appropriate adjustment board or a dispute over changes in rates of pay, rules, and working conditions (class *b*) or any other dispute (class *c*) not settled in conference." (Emphasis supplied)

The Report of the Senate Committee on Interstate Commerce considering H. R. 9463 (Rept. No. 606, 69th Cong., 1st Sess., dated April 16, 1926)⁶ is not as detailed as the House report, but it too makes crystal clear the unlimited nature of the duty imposed by Section 2. This report states in pertinent part as follows: (page 1)

"Briefly stated, the bill provides—

"First. That it shall be the duty of the parties to exert every reasonable effort to make and maintain agreements.

"Second. *That any and all* disputes shall first be considered in conference between the parties directly interested. (Emphasis supplied)

⁶ The report of this Committee on S. 2306, a bill identical to H.R. 9463, made to the Senate on February 26, 1926 (Rept. No. 222, 69th Cong., 1st Sess.) reads the same as the quoted statements from Report No. 606.

"Fourthly. A board of mediation is created to consist of five members appointed by the President by and with the advice and consent of the Senate none of whom shall be in the employ of or pecuniarily or otherwise interested in any organization or employ of any carrier. The duty is imposed on this board of mediation to intervene at the request of either party or on its own motion, in *any unsettled labor dispute*, whether it be a grievance, or a difference as to the interpretation or application of agreements not decided in conference or by the appropriate adjustment board, or a dispute over changes in the rates of pay, rules or working conditions not adjusted in conference between the parties. If it is unable to bring about an amicable adjustment between the parties it is required to make every effort to induce them to consent to arbitration." (Emphasis supplied)

It is hardly possible to find words in the English language more unqualified than the phrase "*any and all disputes*" used by the Senate Committee in describing the duty of carriers and employees under the statute to bargain out their differences.

The impact of these statements read in conjunction with the language of the 1926 Act is increased by the fact that the legislation was drafted and presented by a joint committee of management-labor executives appointed by the President. This fact is set forth in the House Committee Report as follows: (page 1)

"The bill was introduced as the product of negotiations and conferences between a representative committee of railroad presidents and a representative committee of railroad labor organization executives, extending over several months, which were concluded with the approval of the bill, respectively, by the Association of Railway Executives

and by the executives of 20 railroad labor organizations. As introduced it represented the agreement of railway managements operating over 80% of the railroad mileage and labor organizations representing an overwhelming majority of the railroad employees."

Thus, both the language of the Railway Labor Act of 1926 and the description of its effects by the Committees of Congress clearly show that the statute placed a duty upon carriers and employees to negotiate together with respect to *any* dispute arising between them, without limitation as to subject-matter.

The final step in this legislative development was the Railway Labor Act of 1934 (45 U.S.C.A. 151 et seq.) which is the basic statute which still governs labor relations in the railroad industry.⁷ This statute retained Section 2, First and Second in the identical language used in the Railway Labor Act of 1926. Since the 1934 statute set up adjustment boards, instead of leaving the organization of such boards to the parties as did the 1926 Act, and conferred jurisdiction on such boards to entertain grievances and disputes arising out of the interpretation or application of agreements, it was necessary to reword Section 5 concerning the functions of the National Mediation Board. However, in rewording the language of Section 5, First Congress clearly retained the concept that carriers and employees should negotiate with respect to any dispute, without limitation of subject-matter, and that

⁷ The amendments to the Railway Labor Act that have been made since 1934 have not affected the scope of collective bargaining under that statute except that the 1951 amendment to Section 2, Eleventh makes lawful union shop agreements specifically invalidated by the 1934 statute. See *supra*, page 15.

if they were unable to reach agreement, the dispute should be mediated and arbitrated or subjected to fact finding if it was not the type referable to an adjustment board.

This is shown in the language of Section 5, First (b) which recognizes and provides for the mediation of disputes in addition to those concerning changes in rates of pay, rules, and working conditions covered by paragraph (a) and embraced within the category of "any other dispute not referable to the National Railroad Adjustment Board".

Thus, the Court of Appeals had no basis either in the language of the statute or in its legislative history (which is not mentioned in the court's opinion) for limiting the subject-matter of disputes with respect to which the carriers and employees are required to confer exert reasonable effort to settle in conference under the Railway Labor Act.

C. The reasons advanced by the court below as grounds for limiting collective bargaining under the Railway Labor Act are either irrelevant or involve misapplications of this Court's decisions

The Court of Appeals advanced two reasons in support of its conclusion that the subject-matter of the petitioners' request was outside the scope of collective bargaining under the Railway Labor Act. Neither of these reasons has any legal validity.

First, the court below stated in substance that this Court had restricted the area of collective bargaining

* This is also shown by the statement in the Report of the House Committee on Interstate and Foreign Commerce (Report No. 1944, 73rd Cong., 2nd Sess., dated June 11, 1934) with reference to Section 2 that "The bill does not introduce any new principles into the existing Railway Labor Act * * *."

under the Railway Labor Act in the *Graham*, *Howard*, *Steele* and *Tunstall* decisions and that it could "see no material difference between the *Howard* case and the case before us." (R. 384) This application of the cited cases to the present problem is clearly erroneous.

The cited cases did not limit the subject-matter of collective bargaining under the Railway Labor Act. Instead, they hold in substance that, whatever the subject-matter of the bargaining may be, the duly certified representatives of the employees must use its bargaining authority so as not to improperly discriminate against parts of the craft or class represented. The particular discrimination involved in the cited cases related to race. The cases obviously have nothing to do with the question of whether the Railway Labor Act limits the subject-matter of collective bargaining.

Second, the Court of Appeals held that it would be undesirable for the railroad industry if carriers were required to bargain on matters like that set forth in petitioners' request to the railroad. (R. 382-383) The court's opinion indicates that this was the most important factor affecting its decision. In short, the court below was simply determining the future course of collective bargaining in the railroad industry upon the basis of its judgment as to what is good or bad for the industry. It does not require argument to support the proposition that such a consideration is wholly irrelevant in this case.

Obviously, the only proper course of judicial inquiry is an investigation of what Congress intended in its adoption of the Railway Labor Act. Such an inquiry involves an examination of the language of the statute

and the legislative history of that language. In spite of the obvious nature of this fact, the court below does not mention the language of the Railway Labor Act, except a passing reference to Section 6 (R. 382), and gives no consideration at all to the lengthy legislative history cited above. Instead, the court weighs the problem almost entirely in the context of its own thinking as to what is desirable for the industry. This type of judicial inquiry was recently rejected by this Court in *United Steelworkers of America v. United States* (Case No. 504, decided November 7, 1959). In its decision in that case, this Court stated:⁹

"The arguments of the parties here and in the lower courts have addressed themselves in considerable part to the propriety of the District Court's exercising its equitable jurisdiction to enjoin the strike in question once the findings set forth above had been made. These arguments have ranged widely into broad issues of national labor policy, the availability of other remedies to the executive, the effect of a labor injunction on the collective bargaining process, consideration of the conduct of the parties to the labor dispute in their negotiations, and conjecture as to the course of those negotiations in the future. We do not believe that Congress in passing the statute intended that the issuance of injunctions should depend upon judicial inquiries of this nature. Congress was not concerned with the merits of the parties' positions or the conduct of their negotiations. Its basic purpose seems to have been to see that vital production should be resumed or continued for a time while further efforts were made to settle the dispute. To carry out its purposes, Congress carefully surrounded the injunction proceedings with

⁹ Page 3 of opinion as reported in *Labor Relations Reporter*, November 9, 1959, Vol. 45, No. 3 (45 LRRM 2044 et seq.).

detailed procedural devices and limitations. The public report of a board of inquiry, the exercise of political and executive responsibility personally by the President in directing the commencement of injunction proceedings, the statutory provisions looking toward an adjustment of the dispute during the injunction's pendency, and the limited duration of the injunction, represent a congressional determination of policy factors involved in the difficult problem of national emergency strikes. This congressional determination of the policy factors is of course binding on the courts."

These words are clearly applicable to the decision of the Court of Appeals in this case. Congress has clearly stated its purpose of requiring carriers and employees to confer and settle, if possible, by collective bargaining "all disputes", in order to avoid interruptions to interstate commerce. In order to carry out this purpose, Congress has laid down detailed procedural devices including mediation, arbitration, the public report of a board of inquiry, and the exercise of executive responsibility by the President. "This congressional determination of the policy factors is of course binding on the courts."

However, if there is to be judicial inquiry into policy factors then it should not stop short as does that of the court below.

The history of congressional consideration of labor matters in the railroad field for the past forty years is replete with the concept of the desirability in the public interest of peaceable settlement of controversies between labor and management across the conference table. The entire framework of the Railway Labor Act is built around this principal consideration. This purpose of the proposed legislation pre-

sented to Congress in 1926 as the joint product of railroad management and labor was fully expressed by Mr. Patrick E. Crowley, then President of the New York Central Railroad, to the Senate Committee in the following statement:¹⁰

"Mr. Crowley: Mr. Chairman and Gentlemen of the Committee, I do not think there is much for me to say. Mr. Willard has covered the case fully.

"This bill before you, as Mr. Willard has explained in full, is one that has been agreed to by the representatives of the railroads and the employees of the railroads, and I hope you will give it favorable consideration.

"Fundamentally it provides that the railways and the employees will settle their affairs at home and adjust all their differences between themselves, and if we can do that we can get along better . . .

"This is the first time, I believe, that railroad labor and the railroad officers have come before you in an agreement. The bill provides that we shall settle our affairs at home; failing to do so it provides ways and means that we can dispose of any controversies that are not settled locally. It is, in large measure, an assurance to the public that they will not have strikes and interruption of railroad transportation and I hope you will give us an opportunity to try it out."

The validity of this principle has been proved by the minimum of major strikes within the industry under the Railway Labor Act. Yet, the decision of the Court of Appeals would take a long step forward toward destroying this principle and paralyzing collective bar-

¹⁰ Hearings before Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., on S. 2306, January 25, February 1, 8, 10, 1926.

gaining in the industry. Instead of conferences on "all disputes" and negotiated settlements, as provided by the Railway Labor Act, there will be substituted extensive and expensive court litigation to determine whether in the judgment of the Federal courts it is desirable for the industry to have labor and management confer about a particular subject-matter. Armed with the weapon of such a decision, carriers will simply refuse to confer whenever they find it embarrassing or otherwise inconvenient to do so and labor's only recourse will be protracted litigation in order to even get to the conference table. The Court of Appeals clearly lost sight of the fact that the threatened strike in this case was not to force an agreement, but simply to obtain the acquiescence of the carrier in conferring and thus setting in motion the machinery of the Railway Labor Act for a peaceable resolution of the interests involved. The decision below prevents this and in effect restores the conduct of labor-management relations to the long discarded principle of regulation by injunction. This Association cannot believe that such a result is in the public interest or was ever intended by a Congress that, in adopting the Railway Labor Act, accepted the professions of railroad management that it enabled labor and management to "settle our affairs at home".

Consequently, regardless of the meaning ascribed to "rates of pay, rules, and working conditions" as used in Section 6, the request of the petitioners to the Railroad was a valid one, the carrier violated the statute in refusing to confer and negotiate or mediate with respect to the merits thereof (R. 352, 353) and make every reasonable effort to settle it through such conferences with petitioners or in mediation. Such being the case, petitioners acted within the law in threatening to

strike and the injunction directed by the Court of Appeals (R. 385) was unlawful.

II

THE SUBJECT-MATTER OF PETITIONERS' REQUEST CONCERNED RATES OF PAY, RULES, OR WORKING CONDITIONS AS THAT PHRASE IS USED IN THE RAILWAY LABOR ACT

Assuming *arguendo* that the duty to confer and settle disputes in conferences under the Railway Labor Act, other than with respect to matters covered by Section 3 of that statute, is limited to matters concerning "rates of pay, rules, or working conditions", petitioners' proposal of December 23, 1957 (R. 352) falls within such a classification.

The decision below cites the court's prior (1945) decision *In re Chicago North Shore and M. R. Co.*, 147 F. 2d 723, 727, cert. den. 325 U.S. 852, in support of its conclusion that the subject-matter of the proposal of the petitioners to the Railroad did not concern "rates of pay, rules, or working conditions" as that language is used in the Railway Labor Act. (R. 385) In that opinion at the page cited (page 727), the Court of Appeals expressed in general terms a view as to the meaning of the phrase "working conditions" as that phrase appears in Section 6 of the Railway Labor Act. However, the proposal of the petitioners was to amend the current agreement between them and the Railroad "by adding a rule" relating to the abolition or discontinuance of positions covered by the agreement. (R. 352) Thus, the question involved is not whether the proposal relates to "working conditions", but whether it properly concerns "rules", as that term is used in the Railway Labor Act, a question upon which the *North Shore* case has no bearing. Although many "rules" might be said to also constitute "working conditions", it is

obvious that the term "rule" has a meaning not entirely embraced by the phrase "working conditions", since they are separated in the statute both by the conjunctive "and" as well as the disjunctive "or".¹¹

The term "rules" is not defined by the statute. It should be broadly and liberally construed to accomplish the purposes of the statute. *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 55 (10th Cir., 1956). Such purpose is stated as follows by this Court in *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950) at page 242:

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' 48 Stat. 1186, ch 691, (§ 2), 45 USCA § 151a, FCA title 45, § 151a. This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. See *Elgin, J. & E. R. Co. v. Burley*, 325 US 711, 722, 89 L ed 1886, 1894, 65 S Ct 1282. The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. *Carriers are therefore required to negotiate with bargaining representatives of the employees.* Virginian R. Co. v. System Federation, R. E. D. 300 US 515, 547, 548, 81 L ed 789, 799, 800, 57 S Ct 592. The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail." (Emphasis supplied)

This court has also recognized that the fair and equitable treatment of employees in relation to

¹¹ The conjunctive "and" appears in Section 2, First, and the disjunctive "or" in Section 2, Sixth and Seventh, Section 5, First and Section 6.

changes in railroad operations has an important bearing upon the accomplishment of this purpose.

United States v. Lowden, 308 U.S. 225 (1939). In that case this Court stated: (308 U.S. at 234-236)

"One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system."

* * * * *

"The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored."

The statutory use of the word "rules", with reference to types of agreements is peculiar to the Railway Labor Act, no similar term being found in the National Labor Relations Act, as amended. It grows out of the terminology and customs of the industry. Rule agreements in the industry cover a multitude of subjects which place restrictions on a carrier's common law freedom with respect to discipline, discharge, promotion, transfer or other actions affecting employees or their jobs. All of these "rules" place some veto over management's freedom to pursue its own judgment in a carrier's operations.

An example of a "rule", which is akin in principle and substance to the proposed rule here involved, is found in the existing collective bargaining agreement between the Brotherhood of Railway and Steamship Clerks and Railway Express Agency, dated June 1, 1949. Rule 22 of this agreement provides in pertinent part:¹²

"Positions or work involving a position may be transferred from one seniority district to another after conference and agreement between the management and the duly accredited representatives of the employees * * *."

It is but a short step between an agreement concerning transfer of jobs from one geographical location to another and one relating to abolition of jobs.

But whether the proposal of the petitioners be examined in terms of "rules" or "working conditions" it is clearly a valid subject of bargaining in the railroad industry.

Labor and management in the industry have long believed it proper to concern themselves with agreements dealing with operational changes which can adversely affect employees.

One of the oldest existing agreements between employees and carriers dealing with the "abolition" of "discontinuance" of jobs is the "Agreement of May, 1936, Washington, D. C." popularly known as the "Washington Job Protection Agreement", which restricts the freedom of the carrier signatories to abolish jobs through coordinations. Section 5 of that agreement reads as follows:

¹² All collective bargaining agreements are a part of the official records of the National Mediation Board.

"Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved *on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto.* In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13." (Emphasis supplied)

In addition, this agreement provides for various monetary compensations to employees displaced or dismissed in a coordination. Practically the entire railroad industry on both the labor and management sides is party to this agreement, including the Railroad respondent. The agreement itself is cited by this Court in the Lowden case. (308 U.S. at p. 234)

Thus, almost the whole of the railroad industry, including respondent, is party to an agreement which restricts the freedom of the employer with respect to his freedom of action in abolishing and reassigning jobs.

In addition to the many existing contracts in the railroad field relating to stabilization of employment cited by petitioners and referred to in the decision below (R. 383) this Court's attention is directed to an agreement signed on June 18, 1959, between the Norfolk & Western Railway Company, The Virginian Railway Company and the Association on behalf of its constituent organizations, which contains the following provisions in paragraph 1(a) thereof:¹³

¹³ This agreement is a part of the official records of the Interstate Commerce Commission in Finance Docket No. 20599.

"(a) On the effective date of the said merger, the Norfolk & Western will take into its employment all employees of the Virginian who are willing to accept such employment, and *none of the present employees of either of said carriers shall be deprived of employment or placed in a worse position with respect to compensation at any time during his employment because of the merger of the said railroads or any program of economies undertaken by the Norfolk & Western because of the merger including, but not specifically limited to, installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, relocation of maintenance and repair work, changes in any existing work now performed on the Norfolk & Western or Virginian pursuant to existing agreements, changes pursuant to any integration of employment forces, or other such economies or changes resulting from the merger;* provided, however, that all presently working employees of the Virginian and the Norfolk & Western shall be entitled to the foregoing preservation of employment and, provided further, that in the event that the employee organizations at their option elect not to have presently working employees of either railroad occupy available positions on the merged railroad through integration of seniority rosters without liability to furloughed employees who may be affected by such integration of seniority rosters, then, in that event, said employees shall be entitled only to compensatory benefits and other protection afforded by the terms of the Washington Job Protection Agreement in lieu of preservation of their employment;" (Emphasis supplied).

This agreement covering "preservation of employment" has been accepted by the Commission (Division 4) in its report and order of October 13, 1959, approving the merger of the Norfolk & Western and The

Virginian as satisfying the requirements of Section 5(2)(f) of the Interstate Commerce Act. (49 U.S.C.A. 5(2)(f)) No one has suggested or found present the evil consequences envisioned by the Court of Appeals from such an agreement. Indeed, the Commission found the merger with the agreement to be in the public interest and as greatly productive of efficiencies and economies in the industry.¹⁴

The Court of Appeals noted that there may be agreements in the industry covering the same or similar subject-matter. However, it concluded that this did not change the legal character of such proposals. (R. 384) As a general statement of a legal principle this is, of course, true, but has no application to a situation where custom and usage have a substantial bearing upon the meaning of a particular statutory term.

The court below held in part at least that the proposal of petitioners was invalid because it would enable the Union to control the pace of the Railroad's response to technological developments. (R. 383) This and the other consequences envisioned by the court below involve sheer speculation and are clearly outside of the scope of judicial inquiry in this case. *Supra*, page 30. Moreover, this Court has recognized as a valid labor objective agreements protecting employees against the course of technological change as does the Norfolk & Western agreement cited above. In *United States v. Carozo*, 37 F. Supp. 191 (D.C., 1941), a Federal district court dismissed an indictment against two labor organizations and associated individuals under the Sherman Act based on their efforts by means

¹⁴ Compare this arrangement and the Commission's opinion with the statement below (R. 383) that petitioners' proposal would displace the I.C.C.

of strikes to force paving contractors in the Chicago area to abandon the use of concrete truck mixers or, if used, to employ the same number of men that would be employed if the truck mixers were not used. In so doing the court held that in order to support the indictment, it must appear that the activities of the labor organizations were not activities which come within the normal legitimate and lawful activities which may be employed by a labor union and which under both the Clayton Act and Norris-LaGuardia Act are exempt from prosecution under the Sherman Act. The court then went on to hold, in the following language, that the actions of the labor unions involved would constitute lawful activities for a labor organization:

"Such normal, legitimate and lawful activities of a labor union include the calling of strikes, or threatening to call strikes, in order to enforce their demands, as in the present case a demand against the use of labor saving devices which will displace their members; or, in the alternative, the demand that if the labor saving device is used, the same number of men be employed as would be if the other type of mixer were used. These are legitimate and lawful activities which a labor union is permitted to carry on in an effort to maintain employment and certain working conditions for its members, and any restraint of grade or commerce attendant thereon is only indirect and incidental."

This decision was affirmed by the Supreme Court per curiam in *United States v. International Hodcarriers and Common Laborers' District Council of Chicago and Vicinity, et al.*, 313 U.S. 539 (1941). Likewise, in *United States v. American Federation of Musicians*, 47 F. Supp. 304 (1942) a Federal district court dis-

missed an injunction suit brought by the United States government to enjoin the musicians' union from carrying out a nation-wide boycott of recorded music which was supplanting the live music provided by members of the union. The dismissal was on the ground that the act sought to be enjoined was merely a refusal to work by employees in an effort to obtain, extend and preserve employment opportunities, and accordingly constituted legitimate activities of the union involved. The district court's action in dismissing the suit was affirmed by the Supreme Court, per curiam, in *United States v. American Federation of Musicians*, 318 U.S. 740 (1943). The per curiam opinion cited the decisions of the court in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) and *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91 (1940), both of which broadly interpret the term "labor dispute" found in the Norris-LaGuardia Act.

In addition, judicial decisions interpreting the scope of the phrase "terms and conditions of employment" with respect to the area of collective bargaining under the Labor-Management Relations Act of 1947 have given that phrase a broad interpretation consistent with the petitioners' proposal to the Railroad in this case. Thus, the Court of Appeals for the Fifth Circuit in *National Labor Relations Bd. v. Bemis Bro. Bag Co.*, 206 F. 2d 33 (1953) stated as follows with respect to the meaning of this phrase: (p. 36)

"The language of the statute, which requires bargaining with 'respect to wages, hours, and other terms and conditions of employment,' § 8(d), or in 'respect to rates of pay, wages, hours of employment, or other conditions of employment,' § 9(a), clearly contemplates matters and things which arise out of, and may properly be considered a part of, the employment relation,—the business in which

the employer and the employee participate as necessary and essential components in the furtherance of the enterprise. The Act contemplates the relationship in the work of the enterprise and the engagement of the employer and employee in its prosecution. Conditions under which this employment is, or should properly be, carried on, including those generally accepted as provisions proper to the discharge of the mutual obligations of the employer and employees, or even those which might be deemed fairly debatable which relate to the actual business operation, are within the provisions of the statute as "conditions of employment."

Certainly the continuance of employment or the conditions under which it is to be terminated, which were contemplated by the petitioners' proposal to the Railroad in this case, contemplate "matters and things which arise out of, and may properly be considered a part of, the employment relation,—the business in which the employer and the employee participate". Indeed, the court below has previously held that proposals no different in substance from that advanced by petitioner related to the "terms and conditions of employment" when they emanated from the employer's side. Thus, in *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374 (1954), the court below held that a proposal by an employer for a no-strike clause in a collective bargaining agreement involved a request upon which a union was required to bargain. The advantage of such a clause to the employer is, of course, that it provides stabilization of employment for his benefit. This Association does not perceive how a proposal for stabilization of employment is taken out of the realm of "terms and

conditions of employment" when it comes from the representatives of the employees and is for their benefit.

Thus, it is respectfully submitted that even if the duty to bargain under the Railway Labor Act is limited to matters concerning "rates of pay, rules, and working conditions" the petitioners' proposal to the Railroad involved such subject-matter and the Union could not be enjoined from striking to require the Railroad to confer with it on the proposal.

III

THE COURT OF APPEALS ERRED IN FINDING THAT THE DISPUTE BETWEEN THE UNION AND THE RAILROAD DID NOT INVOLVE A "LABOR DISPUTE" WITHIN THE MEANING OF THE NORRIS-LAGUARDIA ACT AND THAT SUCH ACT DID NOT BAR THE RAILROAD'S REQUEST FOR INJUNCTIVE RELIEF

Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) reads in pertinent part as follows:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) ceasing or refusing to perform any work or to remain in any relation of employment;

* * * * *

"(g) advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) agreeing with other persons to do, or not to do any of the acts heretofore specified; and

"(i) advising, urging or otherwise causing or inducing without fraud or violence the acts here-

tofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 8 of the Norris-LaGuardia Act reads as follows:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Section 13(a) of the Norris-LaGuardia Act (29 U.S.C. 113(a)) provides that a case shall be held to involve or grow out of a labor dispute within the meaning of Section 4 of that Act when, *inter alia*, the case involves persons engaged in the same industry, trade, craft, or occupation and is between an employer and one or more associations of employees. Section 13(c) of the Act (29 U.S.C. 113(c)) further defines the term "labor dispute" as follows:

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The controversy between the Union and the Railroad meets the requirements of Section 13(a) as it involves persons in one industry and is between a railroad employer in that industry and an employee organization.

duly certified as the representative of a craft or class of employees of that railroad. However, the Court of Appeals found that the Norris-LaGuardia Act was inapplicable to this case because the proposal of the Union to the Railroad for an agreement concerning stabilization of employment is outside the ambit of "rates or pay, rules, or working conditions" as those words are used in the Railway Labor Act. (R. 385).

The court below erred, of course, in stating its conclusion in terms of the Railway Labor Act rather than the Norris-LaGuardia Act. The question before the court is not whether the dispute between the Union and the Railroad concerns "rates of pay, rules, and working conditions" as those words are used in the Railway Labor Act, but whether or not the controversy between the parties involved a "labor dispute" within the meaning of the Norris-LaGuardia Act. This distinction is of substantial significance in this case because of the fact that even if the Union's proposal did not concern "rates of pay, rules, and working conditions" as that phrase is used in the Railway Labor Act, it may still involve a "labor dispute" within the meaning of the Norris-LaGuardia anti-injunction statute. Under the decision of the Court of Appeals the latter statute is applicable to only one of the three classes of disputes recognized by Section 5, First of the Railway Labor Act. This involves a narrow construction of the anti-injunction statute whereas it is clear that the act must be given a broad and liberal interpretation in the light of its purposes. Indeed, this fact was long ago recognized by the Court of Appeals itself in one of its earlier decisions following the enactment of the Norris-LaGuardia Act. In *United Electric*

Coal Companies v. Rice, 80 F. 2d 1 (7th Cir., 1935) the Court stated as follows: (page 5)

"Looking to the purpose, as well as to the words, of the Act, we are satisfied that the term 'labor dispute' should be most broadly and liberally construed. The term 'labor disputes' comprehends disputes growing out of labor relations. It infers employment--implies the existence of the relation of employer and employee. Disputes between these parties are the general subject matter of this legislation. *All such disputes seem to be clearly included.*" (Emphasis supplied)

This Court has gone even further and in *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940) stated that the Norris-LaGuardia Act was intended to "drastically" curtail the jurisdiction of Federal courts in the field of labor disputes. The Court's statement on this point reads as follows: (page 101)

" * * * § 1 of the Norris-LaGuardia Act, 29 USCA § 101, provides that 'No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act.' This unequivocal jurisdictional limitation is reiterated in other sections of the Act. The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes."

It is also clear that a "labor dispute" within the meaning of the Norris-LaGuardia Act is not limited to controversies over matters such as wages, hours, unionization or the betterment of working conditions. Thus, in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), this Court held that a controversy between a store and an organization of colored persons, who did not represent store employees, over efforts of the organization to induce the store by picketing to employ Negro clerks, involved a "labor dispute" within the meaning of the Norris-LaGuardia Act. In so holding the Court declared: (pp. 559, 560)

" * * * The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions or employment such as wages, hours, unionization or betterment of working conditions; and that the trial court, therefore, had jurisdiction to issue the injunction. *We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous.*" (Emphasis supplied)

Likewise, the term "labor dispute" as used in the statute has been held to cover a strike for a closed shop, *Lauf v. Skinner*, 303 U.S. 323 (1938); the refusal of members of a union to work on buildings where a non-union contractor is employed, *Levering & Garrigues Co. v. Morrin*, 71 F. 2d 284 (C.A. 2, 1934); a controversy with respect to the performance of work by an employer himself, *Senn v. Tile Layers' Union*,

301 U.S. 468 (1937); and picketing to compel an employer to discharge a non-union employee, *Cinderella Theatre Co. v. Sign Writers' Union*, 6 F. Supp. 164 (D.C. Mich., 1934). In addition, it has been held that a strike to prevent the use of labor saving devices by an employer which will displace union members involves a labor dispute within the meaning of the Norris-LaGuardia Act, *United States v. Carrozo*, 37 F. Supp. 191 (D.C. Illinois, 1941), aff'd per curiam, *United States v. International Hod Carriers, et al.*, 313 U.S. 539 (1941), and that a nation-wide boycott by the American Federation of Musicians to prevent the use of canned music involves terms or conditions of employment within the intent of such Act. *United States v. American Federation of Musicians*, 47 F. Supp. 304 (D.C. Illinois, 1942), aff'd per curiam, *United States v. American Federation of Musicians*, 318 U.S. 740 (1943).

The controversy between the petitioner and the Railroad over its proposal for an agreement concerning stabilization of employment clearly involves a "labor dispute" within the interpretation of that term as set forth in the above-entitled cases. It is difficult to perceive how it can be concluded that the duration of employment or the existence of employment itself does not relate to "terms and conditions of employment" as that phrase is used in the Norris-LaGuardia Act. The statement of Judge Maris on this point in *Diamond Full Fashion Hosiery Co. v. Leader*, 20 F. Supp. 467 (D.C. E.D. Pa., 1937) has the force of logic and reason behind it, even though it is only a holding of a District Court not tested on appeal.¹⁴ In that case an injunction

¹⁴ The appeal was dismissed by agreement (99 F. 2d 1001).

was sought to enjoin a strike and picketing against the Vogue Company by its employees. The company had shut down its plant and that strike prevented the transfer therefrom of machinery which had been sold for use in another state. The court held that the controversy involved a "labor dispute" within the meaning of the Norris-LaGuardia Act in the following language: (p. 469)

"Does it involve a controversy concerning terms or conditions of employment? I think it does. *Certainly the duration of employment is one of its most vital terms.* Here the defendants had a union contract which was in force on August 6, and it was their contention that they had been locked out of their employment by the Vogue Company. I am satisfied from the evidence that their sole purpose in picketing the Vogue Mill was to endeavor to get their jobs back. All of the elements of a labor dispute were present. *Whether the defendants' position was justified or had any real basis is beside the point and is not for this court to pass upon.* The fact remains that there was a dispute between the defendants and the Vogue Company and that it was a labor dispute." (Emphasis supplied)

The decision of the Sixth Circuit involving the Toledo, Ohio, yards of the New York Central cited by the court below (R. 385) is not dispositive of the application of the Norris-LaGuardia Act to the present case. In that situation the railroad brotherhoods involved had not asked the railroad to negotiate an agreement concerning the operation of the yards but were contending that the proposed action of the carrier in closing the yards violated existing contracts. This gave rise to a dispute over which the National Mediation Board refused to take jurisdiction under Section 5, First on the

ground that it was a matter referable to the National Railroad Adjustment Board. It, therefore, fell within the scope of the decision of this Court in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30 (1957) which was issued while the case was pending before the Court of Appeals.

The present case involves a controversy where the employee representative has presented a proposal to the Railroad for the making of an agreement. The only question is whether or not the refusal of the Railroad to confer and negotiate with the Union on this proposal gives rise to a "labor dispute" within the meaning of the Norris-LaGuardia Act. It is respectfully submitted that the decisions cited above interpreting the scope of that Act demonstrate that the controversy is within the ambit of the statute.

It is particularly inconsistent with the purposes of the Norris-LaGuardia Act to give the statute the narrow construction adopted by the Court of Appeals, since it was the use of strike injunctions in railroad labor disputes which give the greatest impetus to its enactment. See *United States v. United Mine Workers*, 330 U.S. 258 (1947).

IV

THE DUTY OF A CARRIER TO CONFER AND SETTLE DISPUTES IMPOSED BY THE RAILWAY LABOR ACT CANNOT BE ABROGATED BY A PERMISSIVE AUTHORITY GRANTED BY A STATE REGULATORY COMMISSION

The opinion of the Court of Appeals states that the proposal of the petitioner in this case is an effort to obtain through the collective bargaining processes of the Railway Labor Act that which would prohibit the Railroad from complying with orders of the South Dakota Public Utilities Commission and the Iowa

State Commerce Commission. (R. 382). The court also states that the demand of the petitioner would displace Congress, the Interstate Commerce Commission, and state regulatory commissions from the determination of the positions which must be maintained by the carrier from the standpoint of efficiency and economy. (R. 383)

The statement regarding Congress and the Interstate Commerce Commission obviously has no foundation in fact. There is not here involved any orders of the Interstate Commerce Commission which require the court to decide any question of accommodation between the Railway Labor Act and the Interstate Commerce Act. Nor is there involved any question of some other statutory directive of Congress. Indeed, the only displacing of Congress that is involved in this case is the holding of the court below limiting the plain and unambiguous direction of Congress that "all disputes" between carriers and employees be settled by voluntary negotiations at the conference table.

The holding of the Court of Appeals with respect to the effect of the petitioners' proposal upon orders of the South Dakota and Iowa state commissions relates to the permission granted by these commissions to the Railroad upon its petition to reduce its agencies and station agents. (R. 378-379). This holding in substance is to the effect that the state regulatory commissions in issuing these orders removed the subject-matter of the Union's proposal to the Railroad from the area of collective bargaining under the Railway Labor Act. It is submitted that this proposition is repugnant to the whole concept of the Railway Labor Act and the supremacy of the regulation of interstate commerce by Congress.

It is clear from the statements of the state commissions themselves that their orders were not intended to interfere with collective bargaining between the Union and the Railroad under the Railway Labor Act and that there is no conflict between those orders and the agreement which the Union proposed to the Railroad. (R. 215, 335)

Moreover, if there were a conflict the provisions of the Railway Labor Act would take precedence over the orders of the state commissions. As has been previously observed, the purpose of Congress in enacting the Railway Labor Act was to promote peace in the field of rail transportation for the settlement of all disputes between carriers and employees. To this end, Congress has provided a system of collective bargaining, mediation, arbitration and fact finding.

If this duty imposed by Congress can be abrogated by an order of a state regulatory commission, the entire structure and concept of the Railway Labor Act has been undermined. It is clear, we believe, that Congress did not intend any such result, nor can there be any serious question of its power to pre-empt this field of regulation, even to the extent of overriding state constitutional provisions.

In *Railway Employes' Dept., A.F.L. v. Hanson*, 351 U.S. 225 (1956), this Court in upholding the authority of Congress to override state laws and state constitutional provisions conflicting with federal regulation of labor-management relations on the railroads stated as follows: (p. 233)

"But the power of Congress to regulate labor relations in interstate industries is likewise well-established. Congress has authority to adopt all appro-

priate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.' *Texas & N. O. R. Co. v. Brotherhood of R. & S.S. Clerks*, 281 US 548, 570, 74 L ed 1034, 1046, 50 S Ct 427. These measures include provisions that will encourage the settlement of disputes 'by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them.' (*Virginian R. Co. v. System Federation*, R. E. D. 300 US 515, 548, 81 L ed 789, 800, 57 S Ct 592), and that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. *NLRB v. Jones & L. Steel Corp.* 301 US 1, 33, 81 L ed 893, 909, 57 S Ct 615, 108 ALR 1352. *Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained.*" (Emphasis supplied)

In the field of railroad labor relations, Congress has chosen the method of collective bargaining and mediation as the best means of preventing interruptions to interstate commerce and has imposed a duty upon carriers and employees to bargain out their disputes. No state can relieve a carrier from this federally imposed duty or restrict the area of bargaining under the federal statute. Any question with respect to this conclusion is removed by the decision of this Court in *California v. Taylor*, 353 U.S. 533 (1957) wherein it was held that the provisions for collective bargaining under the Railway Labor Act overrode provisions of state laws prohibiting such bargaining on a state-owned railroad. In so holding, this Court spoke as follows: (pp. 559-560)

"If the Railway Labor Act applies to the Belt Railroad, then the carrier's employees can invoke its machinery established for adjustment of labor controversies, and the National Railway Adjustment Board has jurisdiction over respondents' claims. Moreover, the Act's policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively with the State concerning terms and conditions of employment which are fixed by the State's civil service laws. This state civil service relationship is the antithesis of that established by collectively bargained contracts throughout the railroad industry. 'Effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.' *Order of R. Telegraphers v. Railway Exp. Agency, Inc.* supra (321 US at 347). If the Federal Act applies to the Belt Railroad, then the policy of the State must give way."

The Court then concluded that the Railway Labor Act did apply to the state-owned railroad and that it was supreme in regulating labor relations on that railroad. To the same effect is the decision in *New Orleans Public Belt Railroad Commission v. Ward*, 195 F. 2d 829 (5th Cir., 1952).

The court below, therefore, clearly erred in holding that the duty of the carrier to bargain under the Railway Labor Act must give way to the permissive regulatory orders of a state commission.

CONCLUSION

Upon the basis of the foregoing points and authorities, it is respectfully submitted that the judgment of the Court of Appeals granting a permanent injunction should be reversed.

Respectfully submitted,

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo 4, Ohio

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

*Counsel for Railway Labor
Executives' Association*

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

November, 1959

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IN U.S.A.

1968

In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. 100

THE ORDER OF RAILROAD TELEGRAPHERS, ET AL.,
PETITIONERS

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL MEDIATION BOARD AS
AMICUS CURIAE

The Solicitor General is filing this memorandum, on behalf of the National Mediation Board, to set forth the Government's views on the following question presented by the petition for certiorari (p. 13):

Whether the Court of Appeals erred in not reversing the District Court's holding that the Railway Labor Act withdraws the right to strike for a second thirty day period following the failure of emergency mediation services.

Although the court of appeals did not find it necessary to pass upon the ruling referred to in the

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Supreme Court of the United States

OCTOBER TERM, 1959.

No. 100

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

PETITIONERS' BRIEF ON THE MERITS.

ALEX ELSON,
LESTER P. SCHORNE,
1625 K Street, N. W.,
Washington 6, D. C.,

Attorneys for Petitioners.

BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,
Of Counsel.

mediation gave rise to a second 30-day waiting period; that it would therefore enjoin the strike until expiration of such 30-day period on September 19, 1958; and that the court otherwise was without jurisdiction to enjoin the strike (R. 167-170). The decree which was entered enjoined the Telegraphers from striking until midnight September 19, 1958 (R. 359); but, following the carrier's appeal from this judgment, the district court, upon the basis of Rule 62(c) of the Federal Rules of Civil Procedure, enjoined the Telegraphers from striking prior to decision of the carrier's appeal (R. 371).

Section 5, First, of the Railway Labor Act, 45 U.S.C. 155, First, provides that either party to a dispute between a group of employees and a carrier may invoke the services of the National Mediation Board (a) in case of a dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference, or (b) in case of any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties. The section also provides that the Board "may proffer its services in case any labor emergency is found by it to exist at any time".

The section (set forth in full in the Appendix, *infra*, pp. 11-12) specifies the procedural steps which are req-

³ As used in the Act, the word "carrier" means railroads, express companies and sleeping-car companies subject to the Interstate Commerce Act (45 U.S.C. 151), but the Act of April 10, 1936, extended the provisions of the Railway Labor Act, except Section 3, to common carriers by air engaged in interstate or foreign commerce (45 U.S.C. 181).

uisite following invocation or proffer of the Board's services. The Board shall promptly put itself in communication with the parties to the controversy and shall use its best efforts, by mediation, to bring them to agreement. If it fails to bring about a settlement, it shall at once endeavor "as its final required action" to persuade the parties to submit their controversy to arbitration. If one or both parties refuse arbitration, the Board shall immediately notify both parties in writing that its mediatory efforts have failed, and for 30 days thereafter working conditions and practices are to remain as they were at the time the dispute arose.

In controversies of the type which come before the Board under Section 5, First, successful termination through mediation or arbitration requires some willingness by the parties involved to adjust or compromise the points in dispute. Realization that failure to achieve settlement will lead, or is likely to lead, to strike action at the end of a 30-day stand-still period puts upon both parties pressure to avoid the consequences of this kind of economic warfare, seriously injurious to each of them.

Such pressure would be materially dissipated if the statute means that after the procedures specified by Section 5, First, have been pursued to the end without avail, a subsequent proffer by the Board of its mediation services on the eve of a strike requires a repetition of these procedures and a second 30-day waiting period following notification of termination of the Board's emergency mediatory efforts. The parties would be aware that failure to effect settle-

ment would not necessarily bring matters to a head 30 days thereafter. There would be the expectation that a strike called following termination of the required 30-day stand-still period would lead to a proffer of emergency mediation, and a repetition of the section's procedures and a second 30-day stand-still period.

Emergency mediation itself would, in the Board's view, lose much of its efficacy if failure therein meant that there would be an ensuing 30-day waiting period, with the possibility that at the end of this period there would be another proffer of emergency mediation giving rise, on failure, to a third 30-day waiting period. We cite below seven relatively recent successful emergency mediations after lack of success in mediation undertaken on the application of one or both of the parties.¹ The Board regards its success in such emergency mediation as largely due to the pressures operating on both parties where the consequences of failure are both serious and im-

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- 1. E-89, Pan American World Airways, Inc. and Air Line Pilots Association.
 - 2. E-124, Braniff Airways, Inc. and Air Line Pilots Association.
 - 3. E-126, Chicago, North Shore & Milwaukee Railway and various nonoperating railway labor organizations.
 - 4. E-130, Braniff Airways, Inc. and International Association of Machinists.
 - 5. E-138, New York Central System and American Railways Supervisors Assn.
 - 6. E-149, Western Air Lines, Inc. and Air Line Pilots Association.
 - 7. E-158, Southern Pacific Company (Pacific Lines) and Order of Railway Conductors and Brakemen.

mediate. This would not be the situation if failure of emergency mediation resulted in the starting of another 30-day waiting period.

In each of the seven successful emergency mediations previously referred to, the Board's action manifested that it construed the statute as providing for only one go-around of Section 5, First, procedures, including its 30-day waiting period. In each of these cases the Board requested the labor union involved to postpone its strike date pending mediation. If the fact of emergency mediation, after prior failure of mediation on application of the parties, brought about a stand-still until the emergency mediation had failed and for 30 days thereafter, it was neither necessary nor appropriate for the Board to request postponement of the strike date. Furthermore, in substantially all of these instances the union acceded to the Board's request on the understanding that, if the emergency mediation failed, the employees would be free to strike immediately upon such failure.

The Board's construction of the statute in the instances cited exemplifies what has been the Board's long-continued and consistent interpretation. Of course, great weight is given the interpretation placed upon a statute by the administrative agency charged with its enforcement. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315; *United States v. Amer. Trucking Ass'ns.*, 310 U.S. 534, 549.

In *Toledo, P. & W. R.R. v. Brotherhood of Railroad Trainmen*, 132 F. 2d 265 (C.A. 7), one of the issues was whether the district court had violated

Section 8 of the Norris-LaGuardia Act, 29 U.S.C. 108, by granting an injunction against a strike by railroad employees. Section 8 bars grant of injunctive relief to any complainant "who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question". The court considered only whether the plaintiff railroad's refusal to arbitrate the dispute was a failure to comply with an "obligation imposed by" the Railway Labor Act. 132 F. 2d at 271. But if that Act means that upon failure of emergency intervention by the National Mediation Board, following failure of its mediatory efforts undertaken at the invocation of one or both parties, there must be a second stand-still period, the railroad unmistakably failed to comply with an obligation—observance of the second stand-still period—imposed by the Railway Labor Act.⁵ Thus the court,

⁵ The Board's services were invoked on January 15, 1941, in a dispute occasioned by the railroad's announcement of a schedule of new rules, working conditions and rates of pay. On November 21, 1941, the Board notified the parties that mediation had been unsuccessful and arbitration had been refused. On December 21, 1941, immediately following the required 30-day stand-still period, the railroad gave notice that it would put its schedule into effect on December 29. But prior to this notice the Board had proffered its services in the "national emergency" created by the bombing of Pearl Harbor on December 7, which emergency intervention failed some time prior to December 29. Accordingly, the railroad undertook to change its rates of pay, rules and working conditions short of 30 days after the failure of emergency intervention.

For the facts here stated, see 132 F. 2d at 272; and 321 U.S. at 52.

by affirming the district court's injunction, implicitly held that the emergency intervention did not give rise to a second stand-still period.

In *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co.*, 321 U.S. 50, this Court reversed the decision of the court of appeals, but it did so, not upon the ground of the railroad's failure to observe the required 30-day stand-still period, but on the basis of the further provision of Section 8 of the Norris-Laguardia Act, which declares that no injunctive relief shall be granted to a complainant who has failed to make "every reasonable effort" to settle the dispute by negotiation or with the aid of governmental machinery or voluntary arbitration. If the railroad's noncompliance with the 30-day waiting period of Section 5, First, of the Railway Labor Act had been a bar to injunctive relief, this Court would have had no occasion to reach the question upon which it rested its decision.

We submit that the statutory scheme gives no indication that Congress intended that the procedural provisions and prescriptions of Section 5, First, should apply a second time, upon emergency mediation by the Board, after the Board has previously pursued all these procedures in mediation upon application of a party to the dispute. We believe that to give the statute this construction would limit its effectiveness and would therefore be contrary to the purposes declared in Section 2 of the Act, 45 U.S.C. 151a. We

urge finally that this construction should be rejected because it is inconsistent with the settled administrative interpretation and with the construction of the statute implicit in the decisions rendered in the *Toledo* case.

Respectfully submitted.

J. LEE RANKIN,

Solicitor General.

ROBERT A. BICKS,

Acting Assistant Attorney General.

CHARLES H. WESTON,

Attorney.

NOVEMBER 1959.

APPENDIX

Section 5, First, of the Railway Labor Act, 45 U.S.C. 155; First, provides:

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and

for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

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~~IN THE~~
Supreme Court of the United States

OCTOBER TERM, 1959.

No. 100.

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners.

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

PETITIONERS' BRIEF ON THE MERITS.

*To the Honorable, the Chief Justice of the United States
and the Justices of the Supreme Court of the United
States:*

The petitioners, The Order of Railroad Telegraphers,
et al. (hereinafter "the Union"), respectfully show:

JURISDICTION.

The jurisdiction of this Court is based on 28 U. S. C.
§ 1254(1). The judgment of the Court of Appeals for the
Seventh Circuit was entered on March 13, 1959. Certiorari
was granted by this Court on October 12, 1959.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, per Perry, J., is not reported. It may be found in the Record at pp. 165-71. The findings of fact and conclusions of law of the District Court appear in the Record at pp. 351-358. The opinion of the Court of Appeals is reported at 264 F. 2d 254. It also is reproduced in the Record at pp. 377-385.

STATUTES AND RULES INVOLVED.

Norris-LaGuardia Act, §§ 1, 4, 7, 8 and 13(c); 29 U. S. C. §§ 101, 104, 107, 108 and 113(c):

Section 1. Norris-LaGuardia Act.

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U. S. C. § 101.

Section 4. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization,

regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute, who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title." 29 U. S. C. § 104.

Section 7. Norris-LaGuardia Act.

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but

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no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvi-

dent or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity." 29 U. S. C. § 107.

Section 8. Norris-LaGuardia Act.

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

Section 13(c). Norris-LaGuardia Act.

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113(c).

Railway Labor Act, §§ 2, First, 2, Second, 5, First, 6 and 10; 45 U. S. C. §§ 152, First, Second, 155, First, 156 and 160:

Section 2, First. Railway Labor Act.

"First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. § 152, First.

Section 2, Second. Railway Labor Act.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U. S. C. § 152, Second.

Section 5, First. Railway Labor Act.

"First. The parties, or either party, to a dispute between an employee or group of employees, and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." 45 U. S. C. § 155, First.

Section 6. Railway Labor Act.

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termina-

tion of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

Section 10. Railway Labor Act.

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation."

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman."

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." 45 U. S. C. § 160.

Federal Rules of Civil Procedure, Rule 62(c).

"**Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

Federal Rules of Civil Procedure, Rule 65(e).

"**Employer and Employee; Interpleader; Constitutional Cases.** These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. Par 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

Federal Rules of Civil Procedure, Rule 82.

"**Jurisdiction and Venue Unaffected.** These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

STATEMENT.

This case presents the question whether the laws of the United States, implemented by the injunctive powers of the federal courts, preclude railway labor unions from securing a voice through collective bargaining in the determination of how the fruits of increased productivity and the consequent burdens of technological unemployment are to be distributed between employers and employees. It arose out of the following facts.

On December 23, 1957, the Union, the certified collective bargaining agent pursuant to the Railway Labor Act for the station, telegraph, and tower employees of the Railroad (Finding 2, R. 351), served a notice pursuant to § 6 of the Railway Labor Act, 45 U. C. S. § 156, to amend the agreement between them by adding the following rule:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." (Finding 3, R. 352.)

The reason for the proposal was stated by the Union's President as follows:

"There has been a change in the management of the Chicago and North Western System. There had been a general slaughter of positions. I mean of jobs. There had also been a consolidation between Omaha and the North Western. Our organization had lost a number of jobs already."

"The incidents or occurrences that I have described extend to and affect all classes of employees represented by the Order of Railroad Telegraphers. Based on our membership survey, approximately one hundred positions had been eliminated other than in the station agent positions." (R. 120.)

The Railroad refused to confer on the subject of the § 6 notice. (Finding 4, R. 352.) The Railroad's intransigent

position on this was revealed in the testimony at the trial by Mr. Heineman, Chairman of the Railroad:

"You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified nor in my opinion can it be." (R. 104.)

After the Railroad's refusal to discuss the proposed rule, the Union notified the Railroad that it was processing the § 6 notice pursuant to the terms of the Railway Labor Act. (Finding 5, R. 352-53.) On February 5, 1958, the Union made application for the mediation services of the National Mediation Board. (Finding 6, R. 353.) The Board docketed the case as Case No. A-5696. (Finding 7, R. 353.) But the mediator assigned by the Board was unable to persuade the Railroad to discuss the merits of the proposed rule and, on May 27, 1958, informed the parties that he had been unsuccessful in his efforts and suggested arbitration in accordance with the provisions of the Railway Labor Act. Both parties declined arbitration. (Finding 8, R. 353.) Mediation was terminated on June 16, 1958, and the file was closed on July 16, 1958. (R. 50-51, 333.)

Under date of July 10, 1958, the Union sought the views of its membership on the question whether a strike should be authorized if necessary to seek a satisfactory settlement of the dispute arising from the proposal of the Union. (Finding 10, R. 354.) The vote in favor of the strike was almost unanimous. (*Ibid.*) No strike action was taken by the Union until after the thirty-day period following the termination of mediation had expired. On August 18, 1958,

a strike call was issued to commence August 21, 1958. (Finding 11, R. 354.) On the day the strike call was issued, the Mediation Board proffered its services on an emergency basis. (Finding 12, R. 354-55.) Both sides accepted the proffer. (*Ibid.*) Case No. E-175, as it was docketed, proved equally futile and was closed by the Board on August 20th, 1958. (*Ibid.*) The Mediation Board did not notify the President that "in its judgment" the impending strike threatened "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service" so as to invoke the President's discretion to appoint an emergency board under Section 10 of the Railway Labor Act. (45 U. S. C. § 160.)

After the service of the § 6 notice, the Railroad pressed proceedings before the Iowa and South Dakota regulatory commissions for permission to adopt its Central Agency Plan which called for the abolition of numerous station agent positions then held by members of the Union. Both commissions granted permission to institute the Railroad's plan for job abolition.

On August 20th, the Railroad instituted this action in the United States District Court for the Northern District of Illinois, asserting that it was entitled to an injunction against the proposed strike because the strike was illegal under the laws of the United States. (R. 4.) Since no diversity of citizenship exists between the parties, the Railroad's right to relief, if it has any, must depend on the notion that the laws of the United States give a right to injunction under the circumstances of this case.

* The order of the South Dakota Commission, when first issued, purported to be mandatory in character. On denial of application for rehearing the Commission disclaimed any intention to interfere with the Railroad's obligations under the Railway Labor Act or its labor agreements. (R. 341-42.) See also pp. 56, 57 *infra*.

On the day that the complaint was filed, the District Court issued a preliminary restraining order enjoining defendants from striking until August 25, 1958. (R. 14-15.) From time to time this order was extended. (R. 15, 73-74, 74.) A bond for \$50,000 posted by North Western was kept in effect during the period of the restraining orders and is still in effect. (R. 1, 73.) The District Court heard the evidence and arguments on the questions of a temporary and permanent injunction on August 25-27, 1958. (R. 1.) After the filing of briefs and further argument, the court rendered its opinion on September 5 and entered its findings of fact and conclusions of law and its decree on September 8, 1958. (R. 165-71; 351-58; 359.) The decree enjoined the strike until September 19, 1958, on the ground that this was the expiration of thirty days following the second Mediation Board effort. (Conclusion 5, R. 358.) In all other respects, it denied the relief sought by the Railroad and dismissed the complaint. On September 16, 1958, however, the District Court, on application of the Railroad, entered an order enjoining petitioners from striking until the disposition of the Railroad's appeal. (R. 371.) A bond for \$50,000 was posted by the Railroad and is still in effect. (R. 2, 371.) Both the Railroad and the Union appealed from the decree of the District Court. (R. 366, 360, 363, 372-73.)

Pending appeal in the Court of Appeals, the petitioners filed a petition for mandamus and a petition for certiorari before judgment in this Court, on the grounds, *inter alia*, that the Norris-LaGuardia Act prevented the issuance of the injunction pending appeal and that the Railway Labor Act does not require a thirty-day postponement of a strike after emergency mediation when all required action had previously been completed. Both petitions were denied. 358 U. S. 916, 920 (1958).

On March 13, 1959, the Court of Appeals for the Seventh Circuit decided the appeals before it in this case. It held that the issue raised by the 16 notice was not one relating to rates of pay, rules, and working conditions, thereby upsetting the trial court's finding as "clearly erroneous." 264 F. 2d at 260. From this false premise it reached a false conclusion, a conclusion which would be in error even if the premise had been valid: that because the issue "is not within the scope of mandatory bargaining . . . the terms of the Norris-LaGuardia Act are here inapplicable." (*Ibid.*) It was to review the judgment based on this opinion that the petition for certiorari was granted.

QUESTIONS PRESENTED.

1. Whether the "laws of the United States", and more specifically the Railway Labor Act and the Interstate Commerce Act, make it illegal for a railway labor union to secure a voice through collective bargaining in the determination of how the fruits of increased productivity and the burdens of consequent technological unemployment are to be distributed between employers and employees, and warrant the interposition of the injunctive processes of the federal courts against a strike for such purposes.
2. Whether the Court of Appeals erred in holding that the contest between the Union and the Railroad, over the Union's proposal to participate in the decision of what jobs which its members hold may be abolished, was not a "labor dispute" within the meaning of the Norris-LaGuardia Act.
3. Whether the Court of Appeals erred in holding that the contract change proposed by the Union did not present a bargainable issue under the Railway Labor Act.
4. Whether the Court of Appeals erred in holding that the Norris-LaGuardia Act does not prohibit the issuance of a strike injunction where the employer has refused to comply with the terms of the Railway Labor Act.

5. Whether the Court of Appeals erred in holding that the right of the Union to propose changes in a contract, bargainable under the Railway Labor Act, was limited by action of State regulatory commissions.
6. Whether the District Court had jurisdiction to entertain this suit in the absence of diversity of citizenship and in the absence of any question "arising under the Constitution or laws of the United States."
7. Whether the Court of Appeals erred in not reversing the District Court's holding that Rule 62(e) of the Federal Rules of Civil Procedure authorizes a federal court to issue an injunction against a strike despite the Norris-LaGuardia Act's prohibition against such an injunction.
8. Whether the Court of Appeals erred in not reversing the District Court's holding that the Railway Labor Act withdraws the right to strike for a second thirty day period following the failure of emergency mediation services.

SUMMARY OF THE ARGUMENT.

This is a case "involving or growing out of a labor dispute" within the meaning of the Norris-LaGuardia Act; accordingly, no court of the United States has or had jurisdiction to issue any restraining order or temporary or permanent injunction.

The Norris-LaGuardia Act establishes a fundamental national policy against interference by injunction with the free play of economic forces in the settlement of labor disputes.

This Court has never held the Norris-LaGuardia Act inapplicable in a railway labor dispute on the ground that the dispute was not one involving or growing out of a labor dispute within the meaning of the Act. Widespread industry practice establishes that job security is a common subject of bargaining, so that a dispute arising from a proposal to bargain concerning such a subject is clearly one involving or arising out of a labor dispute.

The agreement proposed by the Union is one with respect to which the Railway Labor Act imposes the duty to bargain, from which it follows that, even accepting the reasoning of the Court of Appeals, the case is one involving or growing out of a labor dispute. To whittle away the broad and unequivocal imperative of that Act by making exceptions to the duty of collective bargaining will lead to a breakdown of the national policy for settlement of railway labor disputes by injecting into all negotiations an issue as to bargainability.

Even if it be assumed that the subject of the proposed agreement is not one with respect to which the Railway Labor Act imposes a duty to bargain, the case is still one

involving or growing out of a labor dispute and the Norris-LaGuardia Act forbids the issuance of injunction.

Since the Railroad failed and refused to comply with the obligation, imposed by the Railway Labor Act, to bargain concerning the proposed contract change, injunctive relief in any event is barred by Section 8 of the Norris-LaGuardia Act.

Even if it be assumed arguendo that the subject of the proposed agreement was not one with respect to which bargaining was mandatory under the Railway Labor Act, Section 7 of the Norris-LaGuardia Act forbids the issuance of injunction since the findings required by that section have not been and cannot be made.

Irrespective of the Norris-LaGuardia Act, this case is not within the judicial power of the federal courts under Section 1331 or Section 1332 of the Judicial Code, or otherwise. Diversity jurisdiction does not exist and the claim asserted by the Railroad is not one arising under the laws of the United States.

The order of the regulatory commissions of South Dakota and Iowa cannot alter the obligations of the Railroad with respect to collective bargaining under the Railway Labor Act. The States are not empowered to detract from the national scheme for resolution of disputes between management and labor by declaring unlawful the end to which contract negotiations are directed.

Rule 62(c) of the Federal Rules of Civil Procedure did not authorize the District Court to issue an injunction pending appeal. Rules 65(e) and 82 and the history of the Rules make it very clear that no modification of the Norris-LaGuardia Act was either possible or contemplated. To give such an interpretation to Rule 62(c) would be to eviscerate Congressional policy by means of a judicial rule of procedure.

The injunction order restraining the proposed strike for a second period of thirty-days following termination of the emergency mediation services of the National Mediation Board is based on an interpretation of the Railway Labor Act without support in the language of that Act, without precedent, and counter to the custom and tradition in the handling of disputes in the railroad industry and the practical interpretation placed upon the Act by the National Mediation Board. It would frustrate one of the principle purposes of the Act, the settlement of disputes on an emergency basis.

Consequently, all injunctive orders issued in the case should be vacated and the action dismissed.

ARGUMENT.

I.

THIS IS A CASE "INVOLVING OR GROWING OUT OF A LABOR DISPUTE" WITHIN THE MEANING OF SECTION 1 OF THE NORRIS-LA GUARDIA ACT.

1. The Policy Against the Issuance of Injunctions in Labor Disputes.

This case presents a revival of the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed. See generally, Cox, *Cases on Labor Law*, pp. 8-123 (4th Edition, 1958); Gregory, *Labor and the Law*, Chapters I-VII (1946). It is hardly necessary to remind this Court of the importance of the national policy expressed in the Norris-LaGuardia Act, 29 U. S. C. §§ 101 *et seq.* As early as 1914 Congress sought through the Clayton Act (29 U. S. C. §§ 52 *et seq.*) to curb those abuses, which nevertheless continued. "In large part, dissatisfaction and resentment are caused . . . By the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction,' characterized by the consequences of a criminal proceeding without its safeguards, has been challenged." Frankfurter & Greene, *The Labor Injunction* 200 (1936). In the words of the late Mr. Justice Brandeis, the labor injunction was not

ordinarily sought "to prevent property from being injured; nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men." *Truax v. Corrigan*, 257 U. S. 312, 354, 368 (1921) (dissenting opinion). In 1932 Congress, in the Norris-LaGuardia Act, reaffirmed its policy against such abuse of the judicial process, this time with an effectiveness which has endured for a generation. Now, however, the Court of Appeals for the Seventh Circuit, reading the Act with a narrow and hostile interpretation reminiscent of the decisions which emasculated the Clayton Act, has declared that the federal courts must in a large and growing area of industrial conflict resume the role from which they were withdrawn by Congress, and must once again "take up the shock of our industrial warfare." Pepper, *Injunctions in Labor Disputes*, 49 A. B. A. Rep. 174, 179 (1924).

2. This Case Is One Involving or Growing Out of a Labor Dispute as Defined in the Norris-LaGuardia Act.

The Norris-LaGuardia Act provides: "No court of the United States * * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute * * *" (29 U. S. C. § 101), with exceptions not material here (*id.*, § 107). The definition of the term "labor dispute" is comprehensively broad: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment * * *" (*id.*, § 113 (c)). The Union, pursuant to the Railway Labor Act, gave notice of a proposal to change the terms of an existing collective bargaining agreement. The proposed change required collective bargaining with respect to the abolition or discontinuance of existing posi-

tions. The dispute arose when the Railroad refused to bargain concerning the proposed change. It is evident that the proposed change in the agreement related to: (1) the length or duration of employment, and (2) the security of job tenure.

This Court has *never* failed to apply the Norris-LaGuardia Act in a railway labor situation on the ground that the case did not involve or grow out of a labor dispute within the meaning of that Act.

This Court has held that the Norris-LaGuardia Act does not preclude injunction in three situations involving railway labor:

(1) Where the dispute is a "minor" one under the Railway Labor Act—*i.e.*, a dispute concerning the application or interpretation of a collective bargaining agreement and which "contemplates the existence of a collective agreement already concluded, or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 723 (1945). For such disputes the Act provides compulsory arbitration on the initiative of either party, and the Norris-LaGuardia Act has been held inapplicable to disputes pending before the Railroad Adjustment Board. *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

The dispute from which *Chicago River* arose was a minor dispute—"twenty-one grievances of members of the Brotherhood against the carrier. Nineteen of these were claims for additional compensation, one was a claim for reinstatement to a higher position, and one was for reinstatement in the employ of the carrier." 353 U. S. at 32. Minor disputes "are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." 353 U. S.

at 33. For such disputes this Court held the Railway Labor Act provided a procedure for compulsory arbitration. The dispute had been submitted in accordance with the Act to the Adjustment Board and was pending at the time of the strike notice and the suit for injunction. The carrier had complied with the Act, and exhausted its remedies thereunder. 353 U. S. at 41, n. 22. The injunction was issued "to vindicate the processes of the Railway Labor Act" 353 U. S. at 41. The specific reason for holding that the Railway Labor Act modified the Norris-LaGuardia Act with respect to minor disputes was that the former provided for compulsory arbitration, so that "Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." 353 U. S. at 41.

The present case involves a major dispute, not a minor one. The Union has exhausted the procedures of the Railway Labor Act. For such disputes that Act provides no alternative to "the natural interplay of the competing economic forces of labor and capital." 353 U. S. at 40. It was the purpose of Congress to prevent federal injunctions from interfering with that interplay (*ibid.*), and the Railway Labor Act does not, in such a case as this, qualify that purpose.

(2) Where the activity enjoined is in itself illegal, e.g., where the union and the employer have agreed to discriminate against certain employees solely on racial grounds. *Trammell v. Howard*, 343 U. S. 768 (1952).

(3) Where injunctive relief is necessary to compel compliance with positive mandates of the Railway Labor Act. *Virginian R. Co. v. System Federation*, 300 U. S. 515 (1937).

The Court of Appeals did not rely on the principle that a strike may be enjoined if it arises out of a minor dispute with respect to which the Act provides for compulsory

arbitration. It could hardly have done so, since this case clearly involves a major rather than a minor dispute: i.e., a dispute relating to the negotiation of contract terms, not to their interpretation or application. Instead it cited and relied upon the racial discrimination cases, which clearly do not support its decision, and upon a decision by the Court of Appeals for the Sixth Circuit (*Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114 (C.A. 6, 1957), cert. denied, 355 U. S. 877) which is clearly distinguishable from the case at bar.

In the *Howard* case, *supra*, the carrier and the union had entered into an agreement which had the effect of causing the railroad to discharge Negro "train porters" who had been performing the duties of brakemen. At the suit of one of the Negro "train porters" against whom this agreement was directed, this Court held that Norris-LaGuardia did not deprive the courts of power to enjoin the execution of the agreement. This Court said: "**** discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." 343 U. S. at 773. In unqualified terms the Court stamped the agreement as "unlawful" (343 U. S. at 774)—a term which by no stretch of the imagination can be applied to the agreement proposed by the Union in this case..

Since the agreement proposed by the Union's Section 6 notice would have been a perfectly lawful one, the Court of Appeals' decision that the Norris-LaGuardia Act does not apply can be supported only by the notion that what is here involved is not a labor dispute within the meaning of that Act. But the very line of cases on which the Court of Appeals relied establishes with complete clarity that Norris-LaGuardia was held inapplicable therein *not* because there was no labor dispute but because the activity enjoined

was outlawed by federal law and policy. In *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949), another of the racial discrimination cases cited and relied on by the Court of Appeals, this Court said:

"In *Virginian R. Co. v. System Federation*, 300 U. S. 515, we held that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act *** enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-LaGuardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.' ***"

"But the Brotherhood urges that the controversy in the *Virginian* case did not involve a labor dispute within the meaning of the Norris-LaGuardia Act and that accordingly that case must be distinguished on its facts. The Act defines a 'labor dispute' to include 'any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. *** 29 U. S. C. §113-(c). *** We do not accept the Brotherhood's invitation to narrow the meaning of that term. The purpose of the Act would be vitiated and the scope of its protection limited were it to be construed as not extending to efforts of a duly certified bargaining agent to obtain reecognition by an employer. Moreover, if this Court had considered that a labor dispute was not involved, it would hardly have taken the trouble, in the *Virginian* case, to refute contentions based upon parts of the Act,

which as a whole extends its protection solely to such disputes." 338 U. S. at 237-38. (Emphasis in the original.)

In sum, this Court has *never* held the Norris-LaGuardia Act inapplicable in a railway labor situation on the ground that the case was not one involving or growing out of a labor dispute within the meaning of that Act. It has only held that injunctions are available: (1) to require adherence to the Railway Labor Act's procedure for compulsory arbitration of minor labor disputes; (2) to prevent the execution of agreements which discriminate solely on grounds of race and are therefore inconsistent with the policy of the Railway Labor Act and unlawful; and (3) to vindicate rights positively conferred by the Railway Labor Act.

The other case relied on by the Court of Appeals is the decision of the Sixth Circuit in *Brotherhood of Railroad Trainmen v. New York Cent. R. Co.*, 246 F. 2d 114 (C.A. 6, 1957), cert. denied 355 U. S. 877. There the strike was regarded by the court as a mere protest by the union against a managerial decision to close a certain yard, there being no relevant provision in the collective-bargaining agreement. There was no proposal for a new contract, or contract term. There was no Section 6 notice. There was no history, as here, of a consistent refusal by the railroad to bargain over a properly filed Section 6 notice. There was no existing controversy with regard to re-allocation of jobs. Here approximately one hundred positions in addition to station agent positions had been abolished and many more were threatened. In the *New York Central* case the National Mediation Board found that it had no jurisdiction; here the Board took jurisdiction and exhausted the mediation provisions of the Act, even intervening a second time on its own motion.

If the subject of the proposed agreement is one with

respect to which the Railway Labor Act imposes a duty to bargain, as we show in Part I, 3 *infra*, it is certainly true that a dispute arising out of the respondent's refusal to bargain is a labor dispute within the meaning of the Norris-LaGuardia Act. The converse does not follow, and is not true. Even if it were thought that the matter is not within the scope of the duty to bargain imposed by the Railway Labor Act the Norris-LaGuardia Act would still be applicable. See Part I, 4, *infra*.

3. The Agreement Proposed by the Union Is One With Respect to Which the Railway Labor Act Imposes the Duty to Bargain, and It Follows That, Even Under the Reasoning of the Court of Appeals, This Case Involves or Grows Out of a Labor Dispute.

A. *The Railway Labor Act places no limit on the scope of collective bargaining but on the contrary requires bargaining on all subjects.*

The cases arising under the Railway Labor Act establish that issues relating to stabilization of employment and the impact of technological progress are bargainable issues, well within the scope of the statutory duty to bargain.

Collective bargaining, for example, with reference to the size of a crew, or whether work may be taken from a particular group of employees, is well recognized. The most recent court case concerned with this problem is *Butte, Anaconda and P. R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 268 F. 2d 54 (C. A. 9, 1959), cert. denied October 19, 1959, ____ U. S. ____ (1959). In that case, the court held that a dispute arising from section 6 notices served by a railroad to withdraw work from a yard crew or in the alternative, reduce the size of the crew from five men to three men, resulted in a major dispute and that the limitations of the Norris-LaGuardia Act would conse-

quently bar issuance of an injunction against the threatened strike arising from the dispute.

In *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 53 (C. A. 10, 1956), cert. denied 341 U. S. 918 (1956), it was "contended that compulsory retirement of railroad workers is not a proper subject for collective bargaining under the Railway Labor Act. * * *." The Court held, in accord with *Inland Steel Corp. v. N. L. R. B.*, 170 F. 2d 247 (C. A. 7, 1948), and *Lamont v. Georgia Southern & Florida Ry. Co.*, 212 Ga. 63, 90 S. E. 2d 658 (1955), that compulsory retirement was a proper subject for bargaining. It properly stated: "The Act is remedial and should be broadly and liberally construed to accomplish the purposes it was designed to meet." 229 F. 2d at 55. And as this Court noted in *N. L. R. B. v. Wooster Division of Borg-Warner*, 356 U. S. 342 (1958) (separate opinion): "Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. E. g., *Labor Board v. J. H. Allison & Co.*, 165 F. 2d 766 (merit increases). * * * Provisions which two decades ago might have been thought to be the exclusive concern of labor or management are today commonplace in such agreements." 356 U. S. at 353, 358.

The decision of the Court of Appeals assumes that the words "rates of pay, rules, or working conditions" in Section 6 of the Railway Labor Act were intended to limit and define the scope of collective bargaining under the Act. (264 F. 2d at 258.) This assumption is contrary to the holding of this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342 (1944), wherein this Court, speaking through Mr. Justice Jackson stated, at page 346:

"Collective bargaining was not defined by the statute which provided for it, but it generally has been

considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

The express language of the Railway Labor Act, the predecessor statutes pertaining to railroad labor beginning with the Act of 1888, and the legislative history of these enactments makes clear the congressional purpose that peace in the railroad industry be maintained through the processes of collective bargaining.

The Railway Labor Act provides:

"It shall be the duty of all carriers * * * and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions *and to settle all disputes* * * *" (Sec. 2, First, Railway Labor Act, 45 U. S. C.; Section 152, First); and "*All disputes* * * * shall be considered, and, if possible, decided, with all expedition, in conference * * *" (Ibid. Sec. 2, Second, 45 U. S. C. 152, Second.)* (Emphasis added.)

The legislative history of the Railway Labor Act confirms its clearly expressed intent that collective bargaining should extend to all matters. Thus in the Committee Report to the House of Representatives, it was stated:

* * * Disputes * * * are divided into three classes: (a) Disputes over grievances. * * * (b) Disputes over proposed changes in agreements concerning rates of pay, rules of [sic] working conditions. (c) *All other disputes*. * * * *All disputes* must be considered first in conference * * * (H. Report 328, 69th Cong. 1st Sess., page 3.) (Emphasis added.)

* Similar language appears in the statutes which preceded it: Section 301, Title III of the Transportation Act of 1920, 41 Stat. 469; Sec. 2, Newlands Act of 1913, 38 Stat. 104; Sec. 2, Erdman Act of 1898, 30 Stat. 425; and Sec. 1, Act of 1888, 25 Stat. 501.

The same intent is expressed in the Committee Report of the Senate* and in congressional consideration of prior statutes:**

B. The contemporaneous construction placed on the Railway Labor Act both by railroads and unions for more than three decades is that the Act does not place any limits on the scope of collective bargaining.

Throughout the many years of collective bargaining which followed the enactment of the Railway Labor Act, the parties have, by their conduct, given meaning and life to the express language of the Act, imposing the obligation upon them to bargain on all matters in order to maintain peace in an industry vital to the nation's welfare.***

Before and since 1926 railroads and unions have bargained about a wide variety of subjects touching every aspect of the employment relationship. Extensive recognition has been given especially to the difficult and almost always present problems of job security and job tenure.

* Senate Report 222, 69th Cong. 1st Sess., page 1 ("any and all disputes * * *") and 67 Cong. Rec. 4505 ("all disputes").

** Transportation Act of 1920: 59 Cong. Rec. 3310, 3328, 8832 and 8842; Newlands Act of 1912: 50 Cong. Rec. 2179, 2433, 2434; Erdman Act of 1898: 29 Cong. Rec. 2388, 27 Cong. Rec. 2795; Act of 1888: 19 Cong. Rec. 3107; see also 18 Cong. Rec. 2375 and 17 Cong. Rec. 2973, regarding a bill substantially the same as the Act of 1888 in the 49th Congress.

*** It was not until 1953, 27 years after the Railway Labor Act was enacted, that railroads, on a national basis, refused to bargain on the basis that a contract proposal did not present a bargainable issue. That issue, involving a proposed health and welfare plan for employees by the non-operating brotherhoods, was settled by the adoption of such a plan. (*Barnes v. The Akron, Canton & Youngstown Railroad Co.*, 348 U. S. 893.) Significantly our research discloses only one other court case involving a refusal to bargain under the Act based on the nature of the subject matter proposed for bargaining. *McMullan v. Kansas, Oklahoma & Gulf Railway Co.*, 229 F. 2d 50, 53 (C. A. 10, 1956), cert. denied 351 U. S. 918. Non-bargainability as a basis for refusing to confer was not again raised nationally until 1957. For a fuller discussion of this matter see Part V, Appendix to Petitioner's Brief, and summary of instances following conclusion thereof.

In general the essence of the problem is how the fruit of increased production and the consequent burdens of technological unemployment are to be distributed between employees and employers. This problem has been approached in a number of ways beginning with provisions as to the length and term of employment and including seniority provisions, minimum crew requirements, guaranteed mileage, limitations on contracting out of work, severance allowances, supplementary unemployment compensation benefits, guaranteed employment and mutual discussions and joint decision concerning job abolitions.

In the Appendix filed with this brief we have brought together the principal contractual developments in this area in the railroad industry and in industry generally together with relevant historical and economic materials. We invite the attention of the Court to this Appendix for a fuller discussion of the economic aspects of this case.

In this brief we invite the Court's attention to the District Court's finding:

*** Collective bargaining as to the length or term of employment is commonplace. There are a variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads. (Find. 17, R. 356-357.)

In making this finding of fact the District Court in addition to considering the evidence on this issue took judicial notice of the great extent of collective bargaining in this field. Provisions relating to length and duration of employment, dismissal and discharge, job rights in a craft, departmental and plant-wide basis, seniority as a controlling criterion in hiring, promotion, demotion, transfer and lay-offs are standard in collective bargaining agreements throughout the country, including the railroad industry. The

The Railroad recognized that stabilization of employment was a bargainable subject by its participation in the National Agreement of 1956. That agreement specifically excepts from the operation of a three-year moratorium on certain specified Section 6 notices, notices dealing with stabilization of employment and separation allowances. It expressly provides for the serving of such notices and negotiation of agreements concerning them. (National Agreement, November 1, 1956, Article VI(e), R. 269.) The Railroad further recognized the bargainability of the same subject by negotiating and entering into agreements with most of the non-operating Brotherhoods on its property, not including this Union, for severance pay allowances upon the discontinuance of positions. Severance pay is one method of stabilizing the employee's situation touching his finding another job. The severance pay tides him over during the period of unemployment following discontinuance of position, and discourages dismissals, thereby stabilizing employment. The Railroad further recognized the negotiability of the whole subject of stabilization of employment by insisting upon and having incorporated into the severance pay agreement a three-year moratorium prohibiting service of 30 days' notice relating

negotiation of guarantees of pay or work represents a major area of concern in collective bargaining today. Contracts containing such guarantees amount to about 13 per cent of a balanced random sample of 400, but their coverage extends to two-and-a-half million workers." 2 Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts (BNA), 53:1 (2-22-57).

Broughly a seventh of union agreements grant employees leaving the company separation pay² *Ibid.* 40:361 (4-5-57). A recent study shows two million workers have come under such plans since 1956, and at least 35% of all employees represented by unions are so covered. 45 L.R. R. 54 (B. N. A. Nov. 1959.) Many such agreements provide for payment of separation pay for job or plant discontinuance. 2 Collective Bargaining Negotiations & Contracts, 40:362-366 (4-5-57). Limitations on the right to dismiss employees no longer needed because of technological changes are also found in collective agreements. *Ibid.* 65:121 ff. (6-15-56). See also 1 Werne, Law and Practice of the Labor Contract 72 ff. (1957).

to "stabilization of employment, separation allowance or other similar requests or demands," for all the Brotherhoods signatory to the agreement (Pl. Ex. 13, R. 308).

The fact that the National Agreement of 1956 mentions separately notices concerning separation allowances and notices concerning stabilization of employment indicates that the Carriers signatory to the agreement, including this Railroad, recognized that notices could be served making demands going beyond ordinary separation allowances. (National Agreement, November 1, 1956, Article VI(e), R. 269.) See National Mediation Board Interpretations 72, 72-A, 72-B (January 14, 1959).

The present agreement between the Railroad and the Union contains many standard provisions concerning job security, most of which go back for many years. These include a rule with relation to abolition of positions, requiring the giving of two working days advance notice to the telegraphers affected (Rule 9(a)), the so-called scope rules which give the telegraphers exclusive right to perform certain designated work (Rule 1, etc.), extensive provisions relating to seniority in connection with promotions, demotions, new or reopened positions, vacancies, etc. (Rules 3-11, 13, 17-20, 22-24, 28, 29), provisions requiring free transportation for the employee, his family and household goods, when transferred by order of the company, or when change of residence is required resulting from acceptance of bulletined position (Rule 25), provisions for limitation on reduction of hours or working days per week (Rules 43-49), provisions against employees being required to suspend work during assigned hours or to absorb overtime (Rule 51), special wage provisions for handling of train orders and other messages of record by other crafts (119-121), special provisions relating to rates of pay and seniority and establishing qualifications for the operation of printing telegraph machines or similar operating devices (pp. 122-125), and

special provisions assigning the work of operating centralized operated control machines to telegraphers (pp. 127-128).

Even if the proposed subject of agreement were novel, that would be no reason for the Railroad's refusal to discuss it: "... effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 347 (1944).

The practical effect of the decision below is to impede, if not nullify, collective bargaining of contract changes in the railroad industry. The contention of non-bargainability would become routine as to virtually all contract proposals other than those concerned with wages. Without a body of law establishing what is or is not bargainable, intervention of the federal courts by injunction would likewise be sought as a routine matter. The end result would be a breakdown of the administration of the Railway Labor Act and a destruction of the peaceful processes developed thereunder.

4. The Norris-LaGuardia Act Bars the Issuance of an Injunction Even If It Be Assumed Arguedo That the Labor Dispute Here Involved Is Not an Issue With Respect to Which Bargaining Is Mandatory Under the Railway Labor Act.

The basic question in this case is whether the Norris-LaGuardia Act prohibits the issuance of an injunction. The question whether the subject of dispute is one with respect to which the Railway Labor Act imposes a duty to bargain is also involved, but in limited fashion. Because the opinion of the Court of Appeals misconceived the role of that question in the case it is necessary to clarify the matter here.

The fact that the Railway Labor Act imposes a duty to bargain with respect to the proposed agreement is important here for the following reasons:

1. Since the subject was one with respect to which there was a duty to bargain, imposed by the Railway Labor Act, the dispute is clearly a labor dispute within the meaning of Section 1 of the Norris-LaGuardia Act. This is the most important consequence of the question under the Railway Labor Act. We have stated in Part I, 3, *supra*, the reasons which require the conclusion that there was a duty to bargain under that Act, and need not repeat them here.
2. Since the Railroad has not complied with the duty to bargain imposed by the Railway Labor Act, the injunction is in any event barred by Section 8 of the Norris-LaGuardia Act, denying injunctive relief to any complainant "who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration." See Part II, *infra*.
3. Since the Union has exhausted the appropriate remedies available to it under the Railway Labor Act, and the Railroad has persistently flouted the provisions of the Act, the Union is perfectly free to discontinue a relation the terms of which are unacceptable; the acts enjoined are entirely lawful.

It is even more important to emphasize the negative aspect of the role of the question under the Railway Labor Act. In its opinion the Court of Appeals said:

"Thus where a Section 6 Notice dealing with one of the enumerated subjects is given by a union to a carrier, a 'labor dispute' within the meaning of the Norris-LaGuardia Act has arisen. Conversely, where the Section 6 Notice does not pertain to 'rates of pay,

rules, or working conditions', there is no 'labor dispute', and the provisions of the Norris-LaGuardia Act with reference to injunctions are not applicable." 264 F. 2d at 258.

The present case concerns a labor dispute, relating to "terms or conditions of employment" within the Norris-LaGuardia Act. It is also a dispute within the Railway Labor Act. It is not true, however, that coverage by the Railway Labor Act is a prerequisite to the applicability of Norris-LaGuardia's proscription of the injunctive remedy. We do not believe that there is a significant difference between the coverage of the two acts, except as this Court has established a difference in *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 40 (1957). By assuming identity of coverage; however, and by gratuitously engrafting upon the Railway Labor Act, a concept of disputes not within the area in which the parties are under the statutory duty to bargain, the Court of Appeals paved the way for its conclusion that the dispute involved here was not within the coverage of either act.

The policy of Norris-LaGuardia is basic and comprehensive. It is not limited to those cases in which there is a duty to bargain. While the area within which injunctions are prohibited cannot be narrower than that in which bargaining is required, it may be broader. If one can imagine a case in which there is no duty to bargain under the Railway Labor Act, but which involves a labor dispute within the meaning of Norris-LaGuardia, the consequence is not that injunction will issue, but that injunction will issue, if at all, strictly in conformity with the conditions of Norris-LaGuardia. The Court of Appeals seriously impeded clear analysis of the case by its assumption that if there was not a duty to bargain under the Railway Labor Act an injunction should issue as of course, regardless of the Norris-LaGuardia Act.

The concept of a dispute not within the scope of the duty to bargain was borrowed by the Court of Appeals from the Labor Management Relations Act. For its proposition that the dispute here was "not within the scope of mandatory bargaining," and hence not within the provisions of Norris-LaGuardia, the court cited *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958). There an employer insisted, as a condition of entering into a collective-bargaining agreement, upon the inclusion of (1) a "ballot" clause calling for a pre-strike secret vote of employees, union and nonunion, and (2) a "recognition" clause which excluded, as a party to the contract, the international union which was the certified representative. The Board held that both these clauses related to matters outside the scope of mandatory collective bargaining as defined in Section 8 (d) of the Labor Management Relations Act (referring to "wages, hours, and other terms and conditions of employment"), and that the employer's insistence upon their inclusion as the price of agreement on any contract was an unfair labor practice. This Court affirmed, four Justices disagreeing as to the "ballot" clause.

As this Court has had occasion to note, "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act" *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 31-32, n. 2 (1957). The term "unfair labor practice" is not used in the Railway Labor Act. That Act establishes no such agency as the National Labor Relations Board, empowered to determine what constitutes an unfair labor practice and hence, under this Court's decision in the *Borg-Warner* case, to exercise a degree of control over the issues which are thought to be appropriate subjects for

mandatory bargaining. By its decision below the Court of Appeals has in effect read a provision concerning unfair labor practices into the Railway Labor Act, and has set itself up as the agency to determine what are and what are not appropriate subjects of bargaining. In so doing, it has announced that its own determinations of that question are controlling with respect to the scope of the protection which the Norris-LaGuardia Act provides against government by injunction.

The *Borg-Warner* case sharply divided the members of this Court. Referring to the phrase "other terms and conditions of employment," Mr. Justice Harlan said in his separate opinion: "The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation." *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 351, 353 (1958). In his view, the Board "was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies" of the Wagner and Taft-Hartley Acts (*Ibid.* at 354). We are not concerned here with the correctness of that decision. We are vitally concerned, however, with the fact that this Court's decision of a close question under the Labor Management Relations Act has been misapplied to a dispute under the Railway Labor Act with no justification whatever and in such a way as to aggravate the unfortunate consequences which Mr. Justice Harlan anticipated.

The Court of Appeals has misinterpreted the *Borg-Warner* case in such a way as to produce consequences in the railway labor field which were certainly not intended by those who joined in the majority opinion in *Borg-Warner* in the more general field of labor relations to which the decision relates. This Court held only that the matters covered by the "ballot" and "recognition"

clauses were not within the scope of the duty to bargain imposed by the Labor Management Relations Act; it did not hold that bargaining with respect to those matters was forbidden. "As to [matters not within the scope of mandatory bargaining], however, each party is free to bargain or not to bargain . . ." (356 U. S. at 349.) "Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions." (*Ibid.*) The fault of the employer was a narrowly defined one: he might permissibly propose these clauses and bargain over them; his sole fault was in refusing to agree to any contract not containing them. It was this refusal which was construed as a refusal to bargain on matters within the scope of mandatory bargaining. Without such a refusal, the employer would have been free to back his bargaining over the same clauses with his economic power. If a strike had resulted from failure to agree upon one or the other of the clauses, the Norris-LaGuardia Act would have prohibited injunction; there is not the slightest intimation in *Borg-Warner* to the contrary.

Yet the Court of Appeals held that the mere proposal by the Union of a clause relating to job tenure, followed by recourse to its economic position upon the refusal of the Railroad to bargain on the question, deprives the Union of the protection of the Norris-LaGuardia Act. Let us assume for the moment—of course without conceding—(1) that by implication the Railway Labor Act contains some analogue of the Labor Management Relations Act's concept of "unfair labor practices," of which a refusal to bargain on matters within the scope of "mandatory collective bargaining" is one; and (2) that the proposal relating to discontinuance of positions contained in the Union's Section 6 notice was not within the range of subjects with respect to which bargaining was mandatory. The Union was nevertheless free to make the proposal. There was in

existence a collective bargaining agreement between the parties unquestionably relating to matters within the scope of mandatory bargaining, none of which were involved in the proposal. The Union was not in the position of refusing to bargain on "mandatory" issues unless and until agreement should be reached on this "non-mandatory" one; only the issue of job abolition was involved. On the hypotheses stated, each party was free to bargain on the proposal or not, and to enforce its position by recourse to economic resources—in the employment of which the Union would be protected against injunction by the Norris-LaGuardia Act. Yet the Court of Appeals said:

"Accordingly, the issue here is whether the Union's demand falls within the scope of mandatory bargaining. If it does not, the injunction may and should issue." 264 F. 2d at 258.

In this curt and elliptical passage the Court of Appeals decrees, in effect, that by making a proposal which it was perfectly free to make even under the *Borg-Warner* doctrine, and in resorting to the right to strike in order to induce the Railroad to bargain over the proposal, the Union was somehow guilty of an "unfair labor practice" (not described by the Railway Labor Act), and that the penalty—not prescribed by any law—for this practice is exclusion from the protection of Norris-LaGuardia.

The error is compounded by the Court of Appeals' ignoring without discussion the well established rule that the Norris-LaGuardia Act precludes injunctions in suits by private parties to enjoin strikes growing out of unfair labor practices. *California Association of Employers v. Building & Construction Trades Council, et al.*, 178 F. 2d 175 (C. A. 9, 1949) (Company charged Union refused to bargain in good faith); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (C. A. 4, 1948); *Teamsters v. Brewery Workers*, 106 F. 2d 871 (C. A. 9, 1939); *Wilson*

Employees' Representation Plan v. Wilson & Co., 53 F. Supp. 23 (S. D. Cal. 1943); *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625 (D. Minn. 1945).

The most alarming and least excusable aspect of this error is the presumptuous judicial curtailment of the national policy stated in the Norris-LaGuardia Act—a curtailment which finds not a trace of justification in the *Borg-Warner* case. That dealt only with unfair labor practices under the Labor Management Relations Act and *did not involve injunctions or the Norris-LaGuardia Act in any way*. Moreover, the Labor Management Relations Act's concept of "unfair labor practice" and the concomitant distinction between "mandatory" and "permissible" subjects of bargaining have no place in the different plan devised by Congress to regulate railway labor disputes. Under the Railway Labor Act it is "the duty of all carriers *** to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle *all disputes*, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce ***." Section 2, First. (Emphasis supplied.) Such comprehensive language leaves no room for a sector in which the parties are "free to bargain or not to bargain." 356 U. S. at 349. Either the subject of the proposal is one on which agreement would be unlawful; or if it is one with respect to which bargaining is mandatory. In the Railway Labor Act, Congress has comprehensively required resort to collective bargaining on all lawful proposals as a means of avoiding work stoppages; it has established no agency with power to determine that there are some matters, with respect to which collective bargaining is merely permissible. As we have shown in Part I, 3, *supra*, in the judgment of Congress, collective bargaining in this field is so vital that it

is obligatory as to all matters which may lawfully be the subject of agreement.

The refusal of the Court of Appeals to recognize the duty of the Railroad to bargain is based upon (1) repeated characterizations of the Union proposal as a demand for "veto" power; (2) unsupported assertions that the discontinuance of positions is an inviolable prerogative of management; and (3) reliance on cases dealing with proposals with respect to which agreement would be illegal or immoral, and which therefore have no bearing on the proposal of the Union in this case.

In the course of its relatively brief discussion of the legal problem presented, the court referred to the Union's proposal no less than four times as a demand for "veto" power (264 F. 2d at 258, 259), and in still another place said that "the Union's proposal, if accepted, would place in its hands the power to prevent any undertaking by North Western to meet competition by modernizing its operations in the light of technological development * * *." (*Id.*, at 258.) Such language is significant less for its intemperance than for its refusal to recognize or understand the process of collective bargaining which is the cornerstone of national labor policy. The Union did not and could not "demand" a "veto" power. Under the Railway Labor Act the Railroad is not required to agree to any proposal to amend the agreement. It is only required to bargain. The Union asked that it bargain over a proposed change in the contract. The proposed change, if agreed to, would have had no self-executing effect with reference to the abolition or continuance of jobs; by its own terms it would have required further bargaining with reference to any specific plan for job abolition. Had the Railroad, in compliance with its duty under the Act, bargained over the proposal, and had there been failure to reach agreement, the machinery provided by the Act would have gone into

operation: mediation and conciliation, possible arbitration, and finally possible recommendations by an emergency board appointed at the discretion of the President. This is the process of free collective bargaining; this is not a context in which either party is in position to "demand" a "veto³"

The court's determined obliviousness to the true character of the proposal suggests that the court assumed (1) that the Union would at no stage of the bargaining process agree to a modification of the proposal, (2) that if a strike should occur because of the failure to reach agreement on the proposal the Railroad would lose the strike and have no alternative except to agree, and (3) that, if the proposal should become part of the collective bargaining agreement, the Union would never agree to the abolition of any existing positions. Perhaps the court assumed that the Railroad has no bargaining power. Since, however, the entire history of collective bargaining shows that original demands are almost invariably altered in the bargaining process, it is more likely that the court was simply unwilling to concede to the Union the right which Congress has given it—the right to have a voice in decisions affecting job tenure and measures to stabilize employment. The influence which the Union exerts on such matters through the process of collective bargaining is in no sense a veto, and to refer to it as such is to exhibit lack of understanding of, or hostility to, that process itself.

Closely related to this stigmatizing of the Union's proposal are the repeated references by the court to the question covered by the proposal as a managerial "prerogative." The court speaks of "the right to manage and control the administrative functions of its business enterprise" (264 F. 2d at 258); of the "attempt by the Union to arrogate to itself the prerogatives that have been tra-

ditionally and rightfully management's" (*ibid.*); and of an attempt to "usurp legitimate managerial prerogative." (*id.* at 259.) These unsupported aspersions are significant less for their betrayal of the court's bias than for their demonstration of the court's indifference to the history and function of collective bargaining as an instrument of national labor policy. Practically all the subjects of modern collective bargaining were once regarded as matters within the managerial prerogative. The essence of collective bargaining is that matters once decided unilaterally shall be determined bilaterally. *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 353, 358 (1958) (separate opinion). The Court of Appeals in effect held that employment problems precipitated by technological advance are to be decided arbitrarily and unilaterally by virtue of the "prerogative" of management, and are not to be decided cooperatively in accordance with Congressional design through the collective bargaining process.

In concluding this portion of the discussion we must once again emphasize that, even if the court below were not so egregiously in error in its interpretation of the Railway Labor Act, it would still be fatally wrong in its conclusion that Norris-LaGuardia does not apply. For even if the subject covered by the Section 6 notice is not one with reference to which the Railroad has a statutory duty to bargain, the effect is only to bring back into effect the conditions which existed before regulation of labor-management relations imposed the duty to bargain. There would still be the right to propose subjects of agreement; there would still be the right to strike; there would still be the Norris-LaGuardia Act's prohibition against the use of the injunction against strikes. The notion that the scope of the Norris-LaGuardia Act's limitation of federal court jurisdiction is narrowed by the scope of "mandatory"

collective bargaining under the Railway Labor Act—even if there is assumed to be a limit on the scope of that duty to bargain is a figment of the court's imagination.

II.

SINCE THE RAILROAD FAILED AND REFUSED TO COMPLY WITH ITS OBLIGATION, IMPOSED BY THE RAILWAY LABOR ACT, TO BARGAIN CONCERNING THE PROPOSED CONTRACT CHANGE, INJUNCTIVE RELIEF IS BARRED BY SECTION 8 OF THE NORRIS-LA GUARDIA ACT.

The record in this case plainly shows that the Railroad persistently and intransigently refused to discuss the contract change proposed in the Union's Section 6 notice.

Section 8 of the Norris-LaGuardia Act prohibits the injunction. The proposal of the Union was made in good faith. That there was a genuine dispute there can be no doubt. If it should be ultimately and authoritatively determined that the issue was not a bargainable one under the Railway Labor Act, certainly it cannot be said that on that question there was not room for a reasonable difference of opinion. Yet the response of the Railroad to the serious problem tendered in good faith by the Union's Section 6 notice was one of obdurate refusal to discuss the matter in order to avert what the Railroad itself characterizes as a major interruption of commerce. This obduracy and this refusal to participate in any way in the processes prescribed by the Railway Labor Act for the settlement of disputes disqualifies the Railroad as an applicant for injunctive relief. *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

III.

EVEN ASSUMING THAT THE SUBJECT OF THE UNION'S SECTION 6 NOTICE WAS NOT ONE ON WHICH THE RAILWAY LABOR ACT REQUIRES THE PARTIES TO BARGAIN, SECTION 7 OF THE NORRIS-LA GUARDIA ACT PROHIBITS THE ISSUANCE OF AN INJUNCTION SINCE THE FINDINGS REQUIRED BY THAT SECTION WERE NOT MADE AND CANNOT BE MADE BY THE DISTRICT COURT.

The subject of the Union's Section 6 notice was one on which the Railway Labor Act required the parties to bargain. But if this were not so—if it were true, as the Court of Appeals held, that the subject is within some area in which bargaining is "permissible" but not mandatory—still the mandate of the Court of Appeals, directing that a permanent injunction issue, is in the teeth of the Norris-LaGuardia Act. Obviously, as the *Borg-Warner* case itself demonstrates (356 U. S. 342), there may be a labor dispute although there is not a statutory duty to bargain. And the Norris-LaGuardia Act declares a fundamental and sweeping national policy against the use of the injunction in labor disputes. No injunction may issue except in conformity with Section 7 of that Act. Here we emphasize that among the findings that are prerequisite to the issuance of an injunction are these:

1. The district court must find that *unlawful acts* have been threatened or committed, and will be committed or continued unless restrained.
2. The district court must find that substantial and irreparable injury to complainant's *property* will follow.
3. The district court must find that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Not one of these findings was made by the district

court; not one of them could be made on this record, nor on the basis of any further hearing; the facts required to be found are not even alleged in the complaint nor were any such findings requested by respondent.

The case was tried on the theory that Norris-LaGuardia was not applicable. The decision of the Court of Appeals, however, viewed in the light most favorable to the Railroad, holds no more than (1) that the issue was not one with respect to which the Railway Labor Act makes bargaining compulsory, and (2) that the orders of the state regulatory commissions superseded the provisions of the Railway Labor Act. From these propositions, even if they were sound, it does not follow that injunction may issue. Subject to the exceptions noted in Part I, *supra*, Section 7 of the Norris-LaGuardia Act specifies the sole conditions under which an injunction may be granted in a labor dispute. *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 329 (1938).

IV.

THE DISTRICT COURT LACKED JURISDICTION TO ENTERTAIN THIS ACTION REGARDLESS OF THE APPLICABILITY OF THE NORRIS-LA GUARDIA ACT.

A. Diversity Jurisdiction Does Not Exist.

The Railroad's principal place of business is Chicago, Illinois. (R. 5.) The individual petitioners are citizens of the State of Illinois. (R. 5.) Jurisdiction cannot, therefore, be predicated on 28 U. S. C. § 1332, as amended July 25, 1958, prior to the filing of this action. (R. 3.)

B. Federal Question Jurisdiction Does Not Exist.

Although the Railroad's complaint asserts that this is a case arising under federal law (R. 5), nowhere in the complaint or in the course of the proceedings in the Dis-

istrict Court, in the Court of Appeals, or in this Court has it shown any basis for its assertion that its claim to injunctive relief is based on any federally created right within Section 1331 of the Judicial Code, 28 U. S. C. § 1331. And in the absence of such basis for relief, the District Court was not empowered by Congress to entertain this litigation.

It would be an imposition on this Court to suggest that it has already resolved the specific question involved here. In 1944, the Court treated the question as an open one, *Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50, 54-55, n. 5 and it has not passed on the issue since that time. And, so far as petitioners have discovered, only one Court of Appeals has ruled on the question since then. In *Trainmen v. New York Central R. R.*, 246 F. 2d 114 (C. A. 6, 1957), cert. denied 355 U. S. 877 (1958), which is distinguishable from this case in that the union there had not served a section 6 notice nor exhausted its remedies under the Railway Labor Act, 246 F. 2d at 115, a divided Court of Appeals found jurisdiction to entertain an action for an injunction against a strike on the ground that the railroad was enjoined by Congress to provide railroad services under the Interstate Commerce Act. The Court of Appeals relied on the decision of the Seventh Circuit in the *Toledo* case, *supra*, in which on review this Court announced that the question need not be decided because judgment could rest on other grounds. In the *New York Central* case, Judge (now Mr. Justice) Stewart succinctly pointed to the failure of the Railroad to specify any basis in federal law for invoking the federal judicial power:

"In my view federal jurisdiction does not exist in this case. Citizenship of the parties is not diverse. The controversy certainly does not arise under the Constitution, and I cannot perceive that it arises under

the laws of the United States. Believing that the complaint should be dismissed for want of federal jurisdiction, I do not reach the merits." (246 F. 2d at 122.)

Judge Stewart was in turn relying on the dissent of Judge (later Mr. Justice) Minton in the *Toledo* case. 132 F. 2d at 272-74.

The case of *Trainmen v. Chicago River & Indiana R. R.*, 353 U. S. 30 (1957), is inapposite for two reasons. First, the right of the railroad there was predicated on the Railway Labor Act's requirement that disputes over contract interpretation be decided by the Adjustment Board. As Mr. Chief Justice Warren said in that case: "The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board:" 353 U. S. at 31. Second, no issue of federal court jurisdiction was raised in that case, and it certainly did not purport to resolve any such question.

The failure of authority requires resort to first principles. These clearly lead to the conclusion that there is no federal question jurisdiction in this case. The first of these principles was stated by Mr. Justice Stone in *Healy v. Ratta*, 292 U. S. 263, 270 (1934): "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." It is not the burden of the petitioners to demonstrate the absence of federal jurisdiction, but rather the burden of the Railroad to establish clearly that the federal judicial power has been properly invoked. No clear line has been drawn by this Court in defining a federal question. But the substance of the rule has become clear through the process of adjudication: the "essential purpose" of the decisions of this Court is "to hold the meaning of the statute limited to cases where

the plaintiff's cause of action, the rule of substance under which he claims the right to have a remedy, is the product of the federal law." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob., 216, 225 (1948). The fact that federal elements are involved is not sufficient to ground federal-question jurisdiction. *Gully v. First National Bank*, 299 U. S. 109 (1936).

There are three possible bases for asserting the existence of federal question jurisdiction here. One is the notion that because the Union's right to be free of the injunction ordered by the Court of Appeals rests on the terms of the Norris-La Guardia Act and the Railway Labor Act, the Railroad has raised a federal question by asserting a position violative of these statutory rights. But it has long been clear that the fact that a defense is predicated on federal law does not give a plaintiff the right to invoke the jurisdiction of the federal courts. *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149 (1908).

A second is the possibility that, though nowhere in the Railway Labor Act is there specific basis for the relief sought here by the Railroad, yet somewhere in the interstices of the policy underlying that statute is to be found a basis for the right to an injunction. This Court has long since rejected such a possibility. Typical of its construction of the Railway Labor Act is the language used in *General Committee v. M.-K.-T. R. R.*, 320 U. S. 323 (1943). There Mr. Justice Douglas, speaking for the Court, said:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be ex-

pected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess. p. 2. Courts should not rush in where Congress has not chosen to tread.

"We are here concerned solely with legal rights under this federal Act which are enforceable by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction by reason of § 24(8) of the Judicial Code, 28 U. S. C. § 41(8). Cf. *Puerto Rico v. Russell & Co.*, 288 U. S. 476, 483; *Gully v. First National Bank*, 299 U. S. 109; *Peyton v. Railway Express Agency*, 316 U. S. 350, 352. When a court has jurisdiction it has of course 'authority to decide the case either way.' *The Fair v. Kohler Die and Specialty Co.*, 228 U. S. 22, 25. But in this case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer." (320 U. S. at 337-38.)

Finally, it is suggested that the obligation of the Railroad to provide railroad services under the terms of the Interstate Commerce Act, 49 U. S. C. § 1, creates a basis for the Railroad's resort to the federal courts whenever it comes in conflict with a labor union, or indeed with any party whose services or supplies are essential to the maintenance of its operations. The answer to this is clear. In the first place any such construction of the Interstate Commerce Act would fly in the face of the expressed policy of Congress as stated in the Railway Labor Act. See, e.g., *General Committee v. M.-K.-T. R. R.*, *supra*; Mr. Justice Frankfurter, concurring, in *Pennsylvania R. R. v. Rychlik*, 352 U. S. 480, 498 (1957):

"The governing outlook for construing the Railway Labor Act is hospitable realization of the fact that it is primarily an instrument of industrial government

for railroading by the industry itself, through the concentrated agencies of railroad executives and the railroad unions. * * * The dominant inference that the Court has drawn from this fact is exclusion of the courts from this process of collaborative self-government."

Moreover, it is hardly necessary to parade the absurd consequences, which are not imaginary, were this Court to suggest that whenever a railroad does not succeed in negotiating the purchase of supplies or services on the terms which it desires, it may come into federal court to compel, by injunction, the party with whom the railroad is dealing to accept the terms which the railroad would impose—on the ground that the railroad could not otherwise comply with the terms of the Interstate Commerce Act. There is no hint, either in the language or the policy of the Interstate Commerce Act, that the federal courts were to be put to this use by the railroads. It is only a few days since this Court recognized that Congress could, if it would, announce the terms and conditions under which labor unions might be enjoined from striking because of the adverse effects on the nation's economy. [*United Steelworkers of America v. United States*, U. S. (Nov. 7, 1959).] Certainly the Court is not ready to assume that the same result should be secured, not only for a period of eighty days but indefinitely, without any such Congressional warrant. In the Railway Labor Act Congress has set forth a specific Executive procedure for temporary deferral of strikes causing national emergencies—i. e., Section 10. The Executive branch has not regarded this impending strike as calling for exercise of that power.

V.

**THE ORDERS OF THE REGULATORY COMMISSIONS OF
SOUTH DAKOTA AND IOWA CANNOT ALTER THE OBLI-
GATION OF THE RAILROAD WITH RESPECT TO COL-
LECTIVE BARGAINING UNDER THE RAILWAY LABOR
ACT.**

Congress, through the Railway Labor Act, has commanded the Railroad as well as the Union to settle their collective bargaining disputes through the machinery prescribed by the statute. The Railroad now claims to be relieved of this Congressionally imposed duty by reason of having secured permission from two State regulatory agencies to decide unilaterally what the Railway Labor Act requires to be decided through collective bargaining. This Court has, in recent Terms, made it abundantly clear that a State may not exempt the Railroad from duties to bargain collectively with the employees, duties imposed upon it by Congress.

In *Teamsters Union v. Oliver*, 358 U. S. 283 (1959), an injunction which had been secured from the Ohio courts, preventing the effectuation of a provision in a collective bargaining agreement between motor carriers and a union on the ground that the provision was violative of the State anti-trust laws, was upset by this Court on the ground that the State had no power thus to interfere with the collective bargaining processes ordained by Congress. In so doing, this Court announced principles so clearly controlling the issue raised by the Railroad here that extensive quotation from the *Oliver* case seems appropriate.

"Within the area in which collective bargaining was required, Congress is not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6. The purposes of the Acts are served by bringing the parties to

gether and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty [citation omitted]; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. [Citation omitted.] We believe that there is no room in this scheme for the application here of this state policy limiting the solution that the parties' agreement can provide to the problems of wages and working conditions. Cf. *California v. Taylor*, 353 U. S. 553, 566-567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. [Citations omitted.] The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. [Citation omitted.] Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. * * * Congress has sufficiently expressed its purpose to * * * exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.' *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 481. [Ellipses in original.] We have not here a case of a collective

bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it." 358 U. S. 295-97.

The applicability of these principles to cases arising under the Railway Labor Act is underlined by the references of the Court to Railway Labor Act cases, and especially to *California v. Taylor*, 353 U. S. 553 (1957). In that case, California contended that its own civil service laws should govern employer-employee relationships on the State-owned belt railway. This Court rejected that proposition in spite of the very special interest the State asserted, and held that the collective bargaining processes of the Railway Labor Act must be followed even by the State of California in its role as railroad-employer. Mr. Justice Burton, speaking for all of the Justices who participated, said:

"* * * the Act's policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively with the State concerning terms and conditions of employment which are fixed by the State's civil service laws. This state civil service relationship is the antithesis of that established by collectively bargained contracts throughout the railroad industry. '[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.' *Order of Railroad Telegraphers v. Railway Express Agency, Inc., supra* (321 U. S. at 347). If [as the Court held] the Federal Act applies to the

Belt Railroad then the policy of the State must give way." 353 U. S. at 559-60.

This quotation was followed by the following footnote, equally relevant to this case:

"For cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, see *Napier v. Atlantic C. L. R. Co.*, 272 U. S. 605 (Boiler Inspection Act); *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439 (Safety Appliance Act); *Erie R. Co. v. New York*, 233 U. S. 671 (Hours of Service Act); *Second Employers' Liability Cases*, 223 U. S. 1 (Employer's Liability Act). Cf. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, to the effect that the Railway Labor Act did not preclude a State from establishing minimum health and safety regulations in the interests of railway employees. That case did not concern a conflict between federally protected collective bargaining and inconsistent state laws." 353 U. S. 560, n. 8.

It is thus patent from the decisions of this Court that any possible conflict between the orders of the State regulatory commissions and the Railway Labor Act must be resolved in favor of the national statute. The States are not empowered to detract from the national scheme for resolution of disputes between management and labor by declaring unlawful the end to which the contract negotiations are directed.

Moreover, even if the State could make such declarations of invalidity, they would not suffice as a basis for invoking the equity jurisdiction of the federal court to issue an injunction against a strike. For Section 4 of the Norris-LaGuardia Act condemns such an injunction even where the State has the power to make the objective of the strike illegal. As Judge Biddle said for the Third Circuit in *Wilson & Co. v. Birl*, 105 F. 2d 948, 950-51 (C. A. 3, 1939):

"• • • Appellant argues that the acts of the union are

unlawful under Pennsylvania law—striking for a closed shop, coercion of appellant's customers not to deal with it, the acts of violence (even though none were proved to have been authorized), picketing in greater numbers than calculated merely to publish the existence of the dispute. It is not necessary for us to discuss whether or not Pennsylvania law condemns these activities, although it may be pointed out that the legality of the closed shop is established by statute, and the propriety of a strike to enforce it was recently recognized by our court. For, as pointed out by the court below, § 4 of the act, 29 U. S. C. A. § 104, enumerates certain acts not subject to injunctive relief. The test is objective; not the purpose or intent of the acts sought to be restrained, and not even their illegality; but whether they come under § 4."

Thus, the Railroad certainly cannot succeed in this action even if the State regulatory commissions' orders were in conflict with the objectives sought to be achieved by the Union here. The fact of the matter is that there is no such conflict.

No State law and no order of any State regulatory commission conflicts with the duty of the Railroad to bargain concerning the proposal made in the Section 6 notice. Not even the South Dakota order in its final form purported to do more than approve the Railroad's request for permission to abandon certain stations. And, indeed, the Railroad has acknowledged that the orders of both the Iowa and South Dakota Commissions were merely permissive and not mandatory. (Respondent's Brief in Opposition, pp. 13 and 15.) The South Dakota order on which the Railroad places such heavy reliance included the following:

"Accordingly we deem it desirable to clarify, and we hereby amend our Findings and Order so as to eliminate and modify any statement therein which may be construed as an adjudication of the validity of or an interpretation or application of any labor agreement,

or as a directive to violate any contract which may in fact exist or to circumvent the Railway Labor Act in connection with the execution of our Order * * *." (R. 215.)

And the Counsel for the Public Utilities Commission and its members made this statement to the South Dakota Circuit Court:

"Correctly construed the Commission's Order does not conflict with the Railroad Labor Act [sic]. The requirement in the Order for a progress report after the expiration of 120 days opened the door to any contingency which may arise, including negotiations, strike, federal intervention, proceedings before the Mediation Board, Adjustment Board, or otherwise, in putting the Central Agency Plan into effect." (R. 335.)

VI.

RULE 62(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE DID NOT AUTHORIZE THE DISTRICT COURT TO ISSUE AN INJUNCTION PENDING APPEAL.

By holding Norris-LaGuardia inapplicable to the instant case, the Court of Appeals implicitly ruled that the District Court had not erred in granting an injunction against a strike pending the disposition of this case on appeal. The Court of Appeals was in error on the principal question and equally in error in not ruling that the injunction pending appeal was invalid.

The trial judge concluded as a matter of law, based on the facts disclosed by the evidence after extended hearings, that he was without jurisdiction to enjoin the proposed strike beyond September 19, 1958. (R. 358.) Accordingly, a decree was entered on September 8, dismissing the complaint and denying all relief except for the injunction order expiring September 19, 1958 (R. 359.) Following the entry of the decree, on motion of the Railroad, the order of

September 16, 1958 was entered enjoining the petitioners from striking pending determination by the Court of Appeals of the Railroad's appeal. (R. 371.) The order recites that it was entered under Rule 62(e) of the Federal Rules of Civil Procedure.

That order of September 16, 1958, plainly violates the express provisions of Rules 65(e) and 82 of the Federal Rules of Civil Procedure and the Norris-LaGuardia Act, which the trial court held to be applicable. The prohibitions of Norris-LaGuardia are phrased explicitly as a withdrawal of jurisdiction. The general prohibition of § 1 is reinforced by the specific provisions of § 4, which bans the issuance of injunctions against strikes and acts in aid of strikes. Again the prohibition is cast in the form of a withdrawal of jurisdiction. Even § 7, which does permit the issuance of injunctions in certain limited circumstances, commences with language denying jurisdiction except where the court, after hearing, makes five prescribed findings—findings not made here.

The draftsmen of the Federal Rules of Civil Procedure took special pains to make certain and specific that the Rules should not be considered as in any way modifying the provisions of the Norris-LaGuardia Act. This was done in Rule 65(e). In its present form Rule 65(e) reads as follows:

"Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges." (Fed. Rules Civil Proc., Rule 65(e), 28 U. S. C. A.)

The form of Rule 65(e) at the time of its original adoption in 1937 was as follows:

"Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24(26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress." (See Fed. Rules Civil Proc., note on 1948 Amendment following Rule 65 (e), 28 U. S. C. A.)

The present form of 65 (e) is a result of a 1948 amendment. Instead of reference to specific statutes, *i. e.*, Norris-LaGuardia and the Clayton Acts, the statutes are described in general terms to avoid necessity for revisions to accommodate legislative changes and did not change the intent. This is made clear by the Committee note to the 1948 amendment to subdivision (e), which provides:

"Specific enumeration of statutes dealing with labor injunctions is undesirable due to the enactment of amendatory or new legislation from time to time. The more general and inclusive reference, 'any statute of the United States', does not change the intent of subdivision (e) of Rule 65, and the subdivision will have continuing applicability without the need of subsequent readjustment to labor legislation." Committee Note of 1948 Amendment, Moore's Federal Practice (1955), Vol. 7, p. 1609.

In the hearings before the House Judiciary Committee on March 2, 1937, Joseph A. Padway, Chief Counsel, American Federation of Labor, questioned whether the language in

Rule 65 (e) relating to temporary restraining orders and preliminary injunctions was intended to limit the scope of the rule. For example, he asked whether the rule was to be applied to permanent injunction decrees. In the course of his testimony he stated: "We want to be sure that the rules do not impinge on the rules already provided in the Norris-LaGuardia Act in any respect." (Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, Third Session, pp. 49-50.)

Major Edgar B. Tolman, Secretary of the Advisory Committee on Rules of Civil Procedure, appointed by the Supreme Court explained Rule 65(e) as follows:

"Rule 65 deals with injunctions. With meticulous care, the provisions of the existing law have been continued and incorporated into the rule. Some question has been raised as to the construction of subdivision (e) of this rule which says—

"These rules do not modify the Act of October 15, 1914, • • • [this and other acts, including the Norris-LaGuardia Act are here enumerated] • • • relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee • • •

"The point has been made that perhaps the words 'relating to temporary restraining orders and preliminary injunctions' limit the rule to those subjects only and do not keep in effect the other provisions of the Norris-LaGuardia Act and the other enumerated acts in regard to the substantive rights of the party and final permanent injunction in labor cases. To one who is familiar with the method adopted throughout these rules of citing the statute by chapter and paragraph and then inserting a short phrase to indicate the general character of the statute, it is readily apparent that these words are merely descriptive and are not words of limitation. This interpretation is further fortified by the evident care manifested in the rule to retain without change all the provisions of the Federal statutes in regard to this important subject." (*Ibid.*, pp. 125-126.)

After arrangements were made for discussion between the representative of the labor organizations and Major Tolman, representing the Advisory Committee, a letter was placed into the record of the hearings from William D. Mitchell, Chairman of the Supreme Court Advisory Committee. (*Ibid.*, pp. 162-164.) This letter reads in part:

"The first thing that is obvious is that most of the provisions in the statutes [Clayton and Norris-LaGuardia Acts] relate, not to matters of procedure but to matters of substantive right, in that they state the facts and conditions which must exist before injunctions can be granted. These new rules of civil procedure have nothing to do with matters of substantive right. The statute under which they are issued expressly provides that 'said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant,' and any rule that was in conflict with this provision of the statute would be void. Furthermore, the rules have been drafted with meticulous care to prevent any interference with substantive right, and to limit their scope to pleading, practice and procedure."

"In addition to what I have said, it will be noted that subdivision (e) states 'these rules do not modify the act of October 15, 1914,' etc. It does not say merely that the rules do not modify these provisions of the acts relating to temporary restraining orders and preliminary injunctions. In this respect it is in contrast with the following clause relating to interpleaders. The phrase 'relating to temporary restraining orders and preliminary injunctions' is merely the description of the act and does not limit the saving clause." (*Ibid.*)

Any possible doubt as to the meaning of the language used in Rule 65(e) was removed by the Advisory Committee by its note to Rule 65(e): "The words 'relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee' are words of

description, not of limitation." (Fed. Rules Civil Proc., Notes of Advisory Committee on Rules, following Rule 65, 28 U. S. C. A.)

The way in which the addition of this note came about and the construction placed on the note by the Committee on the Judiciary of the House of Representatives is summarized in the Report of its Chairman on the Rules of Civil Procedure for the District Court of the United States as follows:

"Two questions were raised with reference to which it was determined there should be an expression of the views of the committee as an aid in the interpretation of the rules in question.

"The other question was raised by Messrs. Padway and Vincent orally at the hearing. Rule 65(e) provides in part as follows:

"These rules do not modify the act of October 15, 1914, chapter 323, sections 1 and 20 (38 Stat. 730), United States Code, title 29, sections 52 and 53, or the act of March 23, 1932, chapter 90 (47 Stat. 70), United States Code, title 29, chapter 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee."

"The apprehension here was that the phrase 'relating to temporary restraining orders and preliminary injunctions;' might be construed as preserving from change only the provisions of the enumerated acts dealing with temporary restraining orders and preliminary injunctions.

"The Committee on the Judiciary suggested that the quoted phraseology in these two rules be considered at a conference between the representatives of the three mentioned labor organizations and of the Supreme Court advisory committee, so that any source of possible difficulty arising from the language used might be avoided. This suggestion was assented to. The conference was held and it was agreed that all doubts as to the meaning of the language used, raised

by the representatives of the labor organizations, would be removed by adding to the notes to rule 4(d) (3) and rule 65(e) of the notes to the rules of civil procedure prepared under the direction of the advisory committee, the following:

"To the note to rule 65(e):

"The words "relating to temporary restraining orders and preliminary injunctions in action affecting employer and employee" are words of description and not of limitation."

"The Committee on the Judiciary has considered the additional notes and believe that they state the correct interpretation and construction of the respective rules." (Report of Committee on the Judiciary on Rules of Civil Procedure for the District Courts of the United States, Appendix to Congressional Record, 75th Congress, 3rd Session, Vol. 83, Part 11, p. 2920.)

See also statement of Robert G. Dodge, member of the Supreme Court Advisory Committee, Proceedings of the Institute on the Federal Rules of Civil Procedure, American Bar Association, Cleveland, 1938, pages 336-337 (The Lord Baltimore Press); Moore's Federal Practice (1955) Vol. 7, pp. 1617-18, 1676; and Barron & Holtzoff, Federal Practice & Procedure (1958) sec. 1438.

The foregoing analysis is further supported by the scrupulous care taken by this Court to comply with the enabling statute under which the rules were promulgated. This statute authorizes the Supreme Court to promulgate the Federal Rules but in express terms states "such rules shall not abridge, enlarge, or modify any substantive right." * * * (Section 2072, Judicial Code, 28 U. S. C. A. 2072.) This limitation was observed by the Court as shown above by Rule 65 (e); but in addition Rule 82, applicable to all the Rules states in unqualified fashion that the Federal Rules of Civil Procedure "shall not be construed to extend or limit jurisdiction of the United States District

Courts * * *. Rule 82 has been interpreted by the courts carefully to exclude any enlargement of their jurisdiction.

The notion that the jurisdictional prohibition of the Norris-LaGuardia Act can be circumvented by reliance on Rule 62(c) is totally unfounded, and would lead to the most absurd results. The same argument which would support the use of Rule 62(c) as the basis for an injunction pending appeal in this case would equally justify the district court, after denying any relief whatever in an action unquestionably within the prohibition of the Norris-LaGuardia Act, in entering an injunction against the exercise of the right to strike for the protracted and indefinite period required for appeal.

It is thus clear beyond the shadow of a doubt that the right to issue injunctions pending appeal given under Rule 62 (c) was never intended to include the grant of authority withdrawn by Congress in the Norris-LaGuardia Act.

VII.

THE RAILWAY LABOR ACT DOES NOT WITHDRAW THE RIGHT TO STRIKE FOLLOWING TERMINATION OF EMERGENCY SERVICES OF THE NATIONAL MEDIA- TION BOARD WHEN THE PROCESSES OF THE ACT HAVE BEEN EXHAUSTED.

After the breakdown of the mediation processes because of the Railroad's refusal to enter into negotiations on the § 6 Notice, the Union took no strike action until after thirty days had elapsed following the termination of the services of the National Mediation Board on June 16, 1958. The trial court, however, held that after the Mediation Board had again tendered its services with equal lack of success for the same reason, the petitioners were required to refrain from striking for a second thirty-day period and entered an order enjoining the strike until

September 19, 1958. (R. 359.) The interpretation thus placed upon the Railway Labor Act is unique. It is an interpretation without precedent. It runs counter to custom and tradition in the handling of disputes in the railroad industry and the practical interpretation placed upon the Act by the National Mediation Board. It is unsupported by the language of the Act and would in fact frustrate one of the principal purposes of the Act, the settlement of disputes on an emergency basis.

A. The First Thirty Day Period.

While there has been no definitive decision of the courts on the extent of the right to strike afforded by the collective bargaining guarantee of the Railway Labor Act, this Court has given the clearest judicial expression to the relation between the statutory scheme and the use of economic power by strike and other methods in *General Committee, etc. v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 at 330, 332-333 (1943).*

The fact is that there is no basis for requiring a union to abstain from striking during the thirty days following the initial mediation effort. The Railway Labor Act is devoid of any limitation on the right to strike except after

* *Brotherhood of Railway and Steamship Clerks, etc. v. Railroad Retirement Board*, 239 F. 2d 37, 44 (D. C. Cir. 1956) does discuss the issue but is limited to a holding that the court would not disturb a decision of the Railroad Retirement Board that for the purposes of the Railroad Unemployment Insurance Act a strike under the circumstances there involved violated the Railway Labor Act.

In the only case decided by this Court involving a strike commenced within thirty days after termination of mediatory services, no argument was made based on this fact. The Court held that it was without jurisdiction to enjoin the strike, *B. R. T. v. Toledo, Peoria & W. R.*, 321 U. S. 50 (1944). In *Butte, Anaconda & P. R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 268 F. 2d 54 (C. A. 9, 1959), cert. denied U. S. (October 19, 1959), an injunction was refused even though the strike occurred before the mediation process was completed.

the appointment of an Emergency Board under Section 10 and hence there was no limitation on the right to strike after the termination of the services of the National Mediation Board.

Section 10 does restrict the right to strike, at least as that section has been interpreted. It provides that if the President should appoint an Emergency Board to investigate and report concerning a dispute, "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made *by the parties to the controversy* in the conditions out of which the dispute arose." This provision obviously is directed to both parties to the dispute, and prohibits either of them from making changes "in the conditions out of which the dispute arose." (Emphasis supplied.)

In marked contrast is the language in Section 5, First and Section 6. Section 6 provides that for specified periods (depending on various contingencies) after either side has served the other with a proposed change in the collective bargaining agreement, "rates of pay, rules, or working conditions shall not be altered *by the carrier* until * * *." (Emphasis supplied.) Obviously, unlike Section 10, this provision instead of being directed to "*the parties to the controversy*" is directed to the "*carrier*," and it would require an extremely tortuous construction to find this language restricting the conduct of "*the parties to the controversy*."

Section 5, First is similar to Section 6 and also is in marked contrast to Section 10. Section 5, First provides that after the termination of mediation and for 30 days thereafter, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." Obviously, that provision is directed to those who can make a change in

rates of pay, rules, working conditions, or practices, and only the carrier can make such change. This is buttressed by the prohibition in this provision of any change in "rates of pay, rules, or working conditions", as contrasted to the Section 10 prohibition of any change "in the conditions out of which the dispute arose."

The foregoing analysis of the language of the Act is corroborated by the legislative history of the purpose of Section 5, First. The 1926 Act contained no provision in Section 5 for a waiting period following the termination of mediation. During the congressional hearings the proponent of the 1934 revision of the Act explained why the 30 day waiting period was placed in Section 5:

"I call your especial attention, however, to a change which appears in the first paragraph of section 5. This provides that the Mediation Board, in the event that its mediatory efforts fail, shall notify both parties in writing to this effect, the prevailing rates of pay, rules and working conditions, however, to remain in status quo for 30 days thereafter. As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 60 days.

"It is provided, you will recall, that when the President appoints a fact-finding board both parties must remain in status quo for 60 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike-vote prior to the termination of mediation. This is obviously a very unsatisfactory expedient, but it does enable the Board of Mediation to certify to the President that an interruption to interstate commerce threatens, thus enabling him in turn to issue an Executive order before the railroad can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several in-

stances. The change now proposed is designed to plug this hole." (Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess., p. 21; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess., p. 50.) (Emphasis supplied.)

It is doubly plain, therefore, both from the distinct difference between the language of Section 5, First and Section 10 and from the legislative history of the former section, that Section 5, First was intended as a restriction on the carriers, making changes in rates of pay, rules, and working conditions, and was not intended as a restriction on the employees' right to strike, which is restricted only by Section 10.

Apart from the specific legislative history with reference to the three sections of the Act referred to, the hearings on the bill that became the Railway Labor Act of 1926 and statements in House debates by proponents of the bill* establish plainly that that Act was not intended to prohibit strikes except to the extent that they were prohibited during the 60 day period after the creation of an emergency board.

The National Mediation Board, charged with the duty of administering the Act, has made the following statement:

"There is nothing in the procedures of the Railway Labor Act which compels the parties to reach agreement. Rather, the law is based on the theory that the parties should reach an agreement of their own accord. *The law does not deny the employees the right to strike.* The right, however, is subject to the obliga-

* See the opening statement by Congressman Barkley, the sponsor of the bill in the House, 67 Cong. Rec. 4513, 4517. See also 67 Cong. Rec. 4702-4703, 4705-4723.

tions to enter into negotiations during which the nature of the dispute can be fully explored and the issues presented, if necessary, to disinterested persons for solution."* (Emphasis supplied.)

B. The Second Thirty Day Period.

In view of the absence of a limitation on the right to strike in the Railway Labor Act, other than that contained in Section 10, the District Court's holding that a strike may not be commenced during a new or second thirty day waiting period is completely without support in the law.

Assuming for the purpose of argument that there is a limitation upon the right to strike during the thirty-day period provided in Section 5, First, of the Railway Labor Act, there is nothing in that section or in any other provision of the Railway Labor Act to support the Court's ruling that where the regular mediatory services of the Board have been exhausted and the parties have waited the thirty-day period involved that they must again wait an additional period of thirty days because emergency services are tendered.

The point which requires emphasis is that the Act visualizes a process whereby the Board will (1) use its best efforts, by mediation, to bring the parties to agreement; and, that failing, will (2) endeavor to induce the parties to submit their controversy to arbitration. This is all. The endeavor to induce the parties to submit to arbitration is "the *final* required action" of the Board. Congress did not require the Board, once it had used its *best efforts* to mediate and then to induce arbitration, and had failed, to "try, try again." How many successive efforts, each resulting in failure and each followed by a thirty-day period, is it possible to contemplate? We do not sug-

* Twenty-first Annual Report of the National Mediation Board (1955), p. 4.

gest that, its regular procedure for mediation having failed, the Board was precluded from trying again, on its own motion, to bring about a settlement. Its intervention at any time may be important in the public interest, and should be encouraged, as it is encouraged by the Act. But we do suggest that *only one* effort, conforming to the required procedures and followed by the prescribed thirty-day period, is contemplated by the Act, and that this is true whether the services of the Board are invoked by the parties, or are proffered by the Board on its own motion, or both. Once the Board has failed by the use of its best efforts to bring the parties to agreement by mediation, it has one duty and one only: to endeavor to persuade the parties to submit to arbitration. That is the Board's *final required action*.

It is clear from the emergency clause of Section 5, First, that it was intended solely to permit the Board in its discretion to step into an emergency situation just as it did in the instant case and try to settle it. Thus, when the National Mediation Board tendered its services on August 18, 1958, it opened a new file on its emergency docket, No. E-175.*

Under the emergency clause the National Mediation Board has developed the salutary practice of voluntarily stepping into disputes on the eve of a strike to endeavor to bring about settlement, even where previous effort pursuant to its required function under this section has failed. This may include attempts to settle work stoppages, or strikes over grievance matters referable to the National

* When the Board proffers its services under the emergency clause of Section 5 of the Railway Labor Act, it assigns such cases to a separate "E" number docket which is separate and distinct from its usual "A" number docket assigned mediation cases. See Twenty-third Annual Report of the National Mediation Board (1957), pp. 11, 16.

Railroad Adjustment Board clearly outside the two classes of disputes it is required to act on.

How this is done is left entirely up to the Board. In contrast to the required procedures above outlined, it is not required to request the parties to submit to arbitration. The Board is given complete freedom to act. Its emergency activity has proved to be valuable in avoiding strikes. In most situations the parties welcome its intervention, because neither loses anything thereby, and a settlement, if achieved, benefits both. The construction placed on the Act by the trial court not only is unsupported by the language of the Act but would make impossible the successful exercise of the mediatory function at the most crucial point of the dispute.

In many labor disputes settlements are reached on the very eve of a strike. It is at this point that the incentive to settle is strongest. Faced with the serious consequences of a strike, both sides make their maximum concessions.

If a thirty-day waiting period were to result automatically from the emergency intervention of the National Mediation Board, the practical effect in most cases would be to delay settlement for thirty days. Rather than be responsible for a delay in settlement, the National Mediation Board would feel compelled to refrain from tendering its emergency mediatory services.

In sum, the construction placed upon the Railway Labor Act by the trial court and implicitly affirmed by the Court of Appeals is unsupported by the Act and would frustrate its basic purpose of encouraging peaceful settlement of disputes.

CONCLUSION.

For the reasons heretofore set out, petitioners respectfully request that this Court reverse the judgment of the Court of Appeals for the Seventh Circuit and remand this case to that court with directions to vacate all injunctive orders entered in this case, dismiss the complaint and order the District Court to assess damages under the bonds posted.

Respectfully submitted,

**ALEX ELSON,
LESTER P. SCHOENE,**

1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioners.

**BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,**

Of Counsel.

Dated November 25, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 100.

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

APPENDIX TO PETITIONERS' BRIEF ON THE MERITS.

Introductory: The Court of Appeals' misinterpretation of the Railway Labor Act is in effect an amendment of that Act. It is an interpretation based on a policy determination which properly is for Congress to make and not the Courts. We deal with the policy issues in this way solely because they are the fulcrum of the Court of Appeals' decision.

The quest for employment security has been the central economic problem of the nation for the last thirty years. Efforts to solve this problem within the framework of our existing institutions have been carried forth on many fronts, and have involved the pragmatic de-

velopment of both public and private programs. In this respect, collective bargaining has been the traditional device by which the American worker has sought to achieve an adequate degree of job security. Through joint consultation between employee representatives and management, it has been possible to establish programs for employment stabilization which reflect the unique circumstances of each situation and thus serve the special needs of the parties at interest. By dismissing the Union's proposal for job security in the present case as "an attempt to usurp legitimate managerial prerogatives" the Court of Appeals for the Seventh Circuit has, in fact, ignored the mass of industrial relations practices in industry in general and the railroad industry in particular. Such an arbitrary and eclectic application of "management prerogatives" to deny the bargainability of the Union's contract proposal stands in conflict with hard assessments of contemporary economic reality and can only reduce collective bargaining to a procedural device for inconsequential debate.

Moreover, it is apparent that if the doctrine of the Court of Appeals were to survive it would substantially impair the efficacy of the collective bargaining process. When confronted with a union proposal which it found distasteful for any reason, management would be encouraged to assert capriciously the non-bargainability of the proposal. Any subsequent attempt by the union to exercise its economic strength would then be immediately met with injunctive litigation which might defer settlement of the issue for years, as in the instant case. A survey of recent collective bargaining developments in the railroad industry clearly indicates that the carriers are prepared to exploit the tactical advantages inherent in the ruling of the Court of Appeals by presumptuous declarations of the non-bargainability of conventional union proposals.* Such an

* See table following Conclusion.

approach may serve the interests of management, but it cannot be reconciled with the endorsement of free collective bargaining by the Railway Labor Act as it has evolved in the United States.

I.

LABOR, MANAGEMENT AND EXPERT OPINION IS UNANIMOUS IN AGREEING THAT JOB SECURITY AND EMPLOYMENT STABILIZATION CONSTITUTE VITAL ASPECTS OF WORKING CONDITIONS.

A ready consensus exists concerning the paramount importance of job security to the American worker. The historical significance of job security as an issue—and a goal—in modern industrial relations was underscored by the Latimer Report, a compendious study of wage and employment guarantees which was carried out at the request of the late President Roosevelt. In viewing the post-World War II scene the Report stated that:

“The recent emergence of demands by organized labor for wage guarantees from employers has been correctly appraised as a trend of great significance, for these demands reflect a basic and urgent drive for security on the part of great groups of workers. But it would be incorrect to think of this drive as either new or unique; it is in the main stream of the American Labor Movement. That movement has been expressed in many ways and its immediate objectives have taken many forms. One objective of the labor movement has always been higher real wages; another has always been security.” (Office of War Mobilization and Reconversion, Office of Temporary Controls, *Guaranteed Wages: Report to the President by the Advisory Board*, 1947, p. 1.)

Similarly, academic experts in the field of union-management relations have long recognized the preeminence of job security and employment stabilization as formal union

objectives. Indeed, the attainment of these objectives may be specified as the *raison d'etre* of organized labor. Thus, Professor Lloyd G. Reynolds of Yale University has noted:

"Workers are continually faced with a scarcity of available jobs, and consciousness of this scarcity molds union philosophy and tactics. The union is a method of distributing these opportunities among union members according to some equitable principle." (Lloyd G. Reynolds, *Labor Economics and Labor Relations*, New York, 1954, p. 236.)

Management representatives have also revealed an awareness of continued worker concern over the problem of job security. In an analysis of alternative programs for employment stabilization within individual companies the National Association of Manufacturers placed job security at the top of the list of employee aspirations. The N. A. M. said:

"The foremost desire of American workers is for job security. The tragic depression years are remembered and feared. Predictions of general unemployment and economic catastrophe have intensified the feeling of insecurity which plagues many employees.

"Regardless of the validity of such fears, if employers do nothing to reassure their employees, labor-management relations may be worsened and productive efficiency reduced, whereas increased efficiency is needed" (National Association of Manufacturers, Industrial Relations Division, *Employment Stabilization*, 1952, p. 6.)

The emphasis placed on job security by labor spokesmen is so well known that it scarcely requires documentation.

The concurrence of labor, management and expert opinion that employment security is a matter of vital private and public concern obviously contributed to the passage of the Employment Act of 1946 by the United States Congress. By this statute, Congress declared it to be:

"* * * the continuing policy and responsibility of

the Federal government . . . to promote maximum employment, production and purchasing power.' (Public Law 304, 79th Congress, 2nd Session, An Act to Declare a National Policy on Employment, Production, and Purchasing Power, and for other Purposes.)

It is clear, then, that the Court of Appeals would exclude from collective bargaining a subject of such importance that it has evoked statements of common concern from all the interested parties and the federal government. Where the affected employees have chosen to be represented by a union, the problem of employment security cannot be subsumed in anachronistic notions of management prerogatives. Instead, collective bargaining becomes the appropriate device for grass roots determination of mutually acceptable remedial programs.

II.

THE PERSISTENCE AND VARIABILITY OF THE EMPLOYMENT STABILIZATION ISSUE IN COLLECTIVE BARGAINING REFLECT THE DIVERSE CAUSES OF INSTABILITY OF EMPLOYMENT.

In the years since the passage of the Employment Act of 1946, the United States has enjoyed relatively full employment. Nevertheless, the problem of employment security has endured for both individual employees and large groups of workers. The persistence of this problem during periods of high level employment serves to dramatize the fact that instability of employment is a consequence of diverse causes which are rooted in the complexities of modern industrial society and the process of economic growth. For this reason, efforts to achieve job security and employment stabilization through collective bargaining cannot be analyzed or understood *in vacuo*. As a preliminary step, it is necessary to describe briefly those

categories of factors which, historically, have given rise to insecurity of employment.

First, *secular economic forces* have been a source of instability of employment. These secular forces comprehend the development of new products, changes in consumer tastes, shifts in the geographical distribution of population and industry, and advances in technology. As such, they constitute the data of economic growth. That these secular developments have had an unstabilizing effect on the employment of large groups of workers is beyond dispute. The widespread use of oil as a source of heat and energy has contributed to the chronic unemployment of a sizable number of the nation's coal miners. (*Causes of Unemployment in Coal Mining and Other Domestic Industries, Hearings Before the Subcommittee to Investigate Unemployment of the Committee on Labor and Public Welfare, U. S. Senate, Eighty-Fourth Congress, First Session*, pp. 185-187, 291-294.) The increased consumer acceptance of synthetic fibers has accelerated the decline of the traditional cotton and woolen goods manufacturing centers in New England with the resultant displacement of major segments of the textile labor force. (*Cf. Problems of the Domestic Textile Industry, Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Congress, Second Session*.) And pervasive changes in technology, encompassed by the term "automation" have reduced employment and rendered established skills obsolete in many industries such as automobiles, steel and chemicals. (*Automation and Technological Change, Hearings before the Subcommittee on Economic Stabilization of the Joint Committee on the Economic Report, Congress of the United States, 84th Congress, First Session*.) It is apparent that despite the maintenance of high levels of aggregate employment in the economy, the *structural* changes in the

labor force associated with secular factors have inevitably introduced powerful elements of job insecurity to given groups of workers.

This does not mean that organized labor in the United States has sought, or will seek, to retard economic growth in the name of employment stability. To the contrary, the trade union movement has accepted the necessity for economic change and has given its primary attention to the task of smoothing the adjustment and equitably distributing the social costs of such change among the affected parties. Within this context, collective bargaining has met its severest test. Organized labor's approach to secular forces, like technological change, was succinctly stated by George Meany, President of the AFL-CIO. Meany said:

"Certainly the trade union movement does not oppose technological change. There can be no turning back to a negative or shortsighted policy of limiting progress. * * * The answer to technological change lies in smoothing its transitions and cushioning the shocks that attend it. This means, in the immediate sense, the establishment of severance pay, retraining of skills, reorganization of work schedules. These are social costs that industry will have to bear in order to avoid the wasting of human resources—and to avoid our calling on government to bear these costs if industry fails to do so." ("What Labor Means By More," *Fortune Magazine*, March, 1955.)

Second, *cyclical fluctuations* in aggregate economic activity constitute a periodic threat to the job security of the individual workers. Because the pace and level of economic activity cannot be rigidly controlled in a democratic society, the United States has been confronted with recurrent periods of recession and depression. Recent advances in economic theory have led to the implementation of fiscal and monetary policies which have reduced the amplitude

of these cyclical fluctuations. However, the post-World War II record clearly reveals that changes in the level of economic activity over the course of the business cycle still create major problems of instability of employment. On three occasions, in 1948-1949, 1953-1954, and 1957-1958, the nation was subjected to periods of recession when unemployment once again became a matter of acute public concern. In 1958, unemployment in the United States reached a post-war high, exceeding 7% of the civilian labor force. The severity and duration of this contraction ultimately generated pressure for additional, temporary unemployment benefits under an emergency federal program. (Temporary Unemployment Compensation, Hearings Before the Committee on Finance, United States Senate, 85th Congress, Second Session; Temporary Unemployment Compensation Act of 1958, Pub. L. 86-7, Mar. 31, 1959, 73 Stat. 14).

Although it is obvious that organized labor cannot independently remove the causes of cyclical fluctuations, it is equally apparent that trade unions can direct their efforts to the formulation of programs and policies through collective bargaining which will lessen the impact of these fluctuations on their members. In this respect, to negotiate over employment stabilization is to focus on a perennial problem of employees and employers alike.

Third, *seasonal* factors contribute to instability of employment in many specific industry situations. In these cases, seasonality of the demand for product of the particular industry, or in the supply of a raw material necessary to the manufacture of the product, is reflected in the level of employment in the industry. Thus, employment in the women's garment industry is geared to the Spring and Fall fashion seasons. Similarly, automobile industry employment varies at different stages of the "model year". On the other hand, seasonal instability of employment in

the meat-packing industry may be traced to the seasonality of the movement of livestock to market.

Because these seasonal factors are unique characteristics of given industries, job insecurity arising from this source has proven to be particularly amenable to remedial programs established by collective bargaining. A long recognized virtue of collective bargaining is its flexibility and capacity for affording mutually acceptable solutions tailored to the specific problems at issue.

Fourth, *managerial factors* give rise to insecurity of job tenure. By managerial factors is meant those factors which derive from the exercise of managerial discretion in a specific employee-employer relationship. For example, instability of employment has been a consequence of the unwillingness, or failure of management to develop stable production schedules over a prescribed period of time even when the aggregate level of production within this period would permit a relatively invariable distribution of employment opportunities. In other situations, job insecurities have been created by managerial decisions to contract-out work that was formerly performed by employees in the plant or shop. And most obviously, the arbitrary exercise of management's authority to discharge individual employees has been a continuing source of instability for the individual worker whose economic livelihood depends upon his ability to retain gainful employment. It is these "managerial prerogatives" which have been the subject of joint determination as a matter of course in any vigorous collective bargaining relationship.

The paramount importance of employment stabilization and job security as a collective bargaining issue in the railroad industry follows from the fact that each of the broad categories of unstabilizing factors enumerated above have had a heavy impact on railroad employment over a period of time. Secular factors like the emergence of air

and motor transportation systems have posed a powerful threat to the maintenance of railroad employment. In addition, the railroad industry has been subjected to pervasive technological changes which have reached almost every aspect of the total employment situation. Major innovations, such as the substitution of diesel for steam locomotives, have paved the way for large increases in productivity and commensurate adjustments in the size and occupational distribution of the railroad work force. (Hearings before the Subcommittee on Surface Transportation, Committee on Interstate and Foreign Commerce, U. S. Senate; 85th Congress, Second Session, Part 4, pp. 2056-2078, 2147-2153; also Harold Barger, *The Transportation Industries, 1889-1946: A Study of Output, Employment and Productivity*, National Bureau of Economic Research, 1951, pp. 93-111.)

At the same time, the accretion of minor technological changes has also injected elements of instability of employment into the railroad labor situation. The cumulative effect of small technological changes on railroad employment, particularly in the maintenance area, has been attested to in a careful study of the transportation industry conducted by the National Bureau of Economic Research:

"Rather striking improvements have been made in the maintenance of track and fixed equipment. The burden placed upon those concerned with permanent way has of course increased through heavier and faster trains. These have necessitated heavier rail, strengthened bridges and relocated tracks. However, the reduction of grades and elimination of curves involved in the relocation of track have made for operating economies, while the installation of automatic crossing signals and the elimination of grade crossings have reduced the need for watchmen. As recently as the early 1920's less than half of all replacement ties were chemically treated; treated ties, which may last twice as long as untreated now comprise more than four-

fifths of all ties made. The use of longer rails and heat treatment of rail ends to withstand battering also decreases the need for maintenance. Finally, in the actual operations of relaying track, a high degree of mechanization has been achieved." (Barger, *supra*, p. 108.)

Beyond these advances in mechanical technology, widespread organizational adjustments have taken place. In the railroad industry, such organizational changes have generally taken the form of consolidation of facilities. The relationship between conventional notions of technological change and the consolidation of railroad facilities was clearly drawn by a report of the Board of Investigation and Research established under the authority of the Transportation Act of 1940. The report declared:

"• • • Railroad consolidation may be regarded as a form of labor-saving improvement—an organizational form of technological advance which raises essentially the same problems with regard to labor as does the progress of technology in the narrower sense. From this point of view, changes in the operating methods of a single carrier are just as much a part of the problem as are co-operative undertakings by two or more carriers." (Railroad Consolidation and Employee Welfare, U. S. Senate Document No. 17, 79th Congress, First Session, p. 2.)

At the present time, the railroad employers including North Western are in the process of pressing proposals which deal with the alleged need for the reduction of engine crew sizes on the unions. (Section 6 Notice Submitted by Carriers' Conference to Brotherhood of Locomotive Firemen and Enginemen, *et al.*, dated November 2, 1959; Demand Concerning Use of Firemen (Helpers) on Other Than Steam Power.) This proposal, first made in 1956, grows out of the technological change associated with the substitution of diesel for steam power. However, when con-

fronted by a union proposal to cope with the dislocations accompanying broad technological changes which are organizational in nature, the North Western retreats behind a defense of "management prerogatives", and the Court of Appeals lends its affirmation to this action. That broadly conceived, jointly determined measures are necessary to cope with the dislocations attending the consolidation of facilities is revealed by an assessment of the human and social consequences of such innovations.

The extraordinary impact of the consolidation and resultant abandonment of railroad facilities on the worker and the community has been vividly documented. A sociological study details the human and economic costs incurred when dieselization led a railroad to close down a service and maintenance center in a small town. The individual worker was confronted with the loss of employment and the obsolescence of specialized skills acquired through long years of experience. Local merchants were forced out of business or continued to operate at a bare margin of profitability. Homeowners saw their equities disappear as property values fell precipitately. The entire community entered a stage of demoralization with little prospect of revival. (W. F. Cottrell; "Death By Dieselization: A Case Study in the Reaction to Technological Change," *American Sociological Review*, June 1951, pp. 360-361.)

The stability of employment of railroad workers has also been adversely affected by cyclical fluctuations in the level of national economic activity. A careful study of railroad employment trends has revealed that the railroad worker enjoys no special immunities from the hazards of the business cycle. Over a thirty year period, railroad employment more or less fluctuated to the same degree as employment in manufacturing in general. (Maurice Parmlee, *Economic Factors Influencing Railroad Employment*, United States

Railroad Retirement Board, 1946, p. 143.) Moreover, certain groups of railroad employees have been more susceptible to cyclical instability of employment than others. Since 1946, cyclical changes in maintenance of way employment, for example, have been two or three times greater than for total United States employment and about 50 per cent greater than for all other railroad employment. (William Haber *et al.*, *Maintenance of Way Employment on U. S. Railroads*, Brotherhood of Maintenance of Way Employees, 1957, p. 65. Professor Haber conducted this independent study at the request of the Brotherhood.)

These cyclical instabilities of railroad employment have often been magnified by seasonal factors. In one situation, seasonal instability of employment was so acute that the shopcraft workers employed by the Seaboard Airline Railroad pressed for a substantial wage increase in order to bring annual earnings up to an acceptable level. As will be shown subsequently, these negotiations led to the formulation of the notable guaranteed employment plan covering the shopcraft workers of that railroad. (John L. Afros, "Guaranteed Employment Plan of Seaboard Railroad," U. S. Bureau of Labor Statistics, *Monthly Labor Review*, pp. 167-171.) Again, it may be noted that the seasonal sources of job insecurity may be greater for some groups of workers than others. In this respect, it may be pointed out that maintenance-of-way employment fluctuates by approximately 20 per cent between February and July of any given year. (Haber, *supra*, p. 99.)

The effect of managerial factors on job insecurity in the railroad industry cannot be sharply distinguished from their effect in other industries. Railroad management cannot be viewed as more or less arbitrary than other managements in invoking its authority to dismiss individual workers. Nonetheless, certain managerial factors have

created special problems of insecurity of railroad employment. For example, the managerial practice of assigning monthly budgets for maintenance work has given rise to employment instability for shop and way maintenance workers beyond the insecurities deriving from secular, cyclical and seasonal factors. (Afros, *supra*, and Haber, *supra*, pp. 195-197.) Also, railroad management has increasingly resorted to the contracting-out of work formerly performed by its own employees. Superimposed upon these managerial factors is the observation that many of the occupational skills indigenous to railroad employment, such as fireman, engineer and telegrapher, are not readily transferable to other industrial situations in the event of displacement.

When confronted with these multiple sources of instability of employment, trade unions do not automatically turn to a single measure to ameliorate the plight of their members. The programs espoused by trade unions to promote stabilization of employment will, in each case, depend upon the factors which generate the instability, the magnitude and severity of the instability, and the peculiar traditions which have marked the evaluation of union-management relations over time. The Court of Appeals has commented that, "• • • stabilization of employment is a broad term, • • •" and thus cannot be used as a blanket justification for infringements on so-called management prerogatives. The Court of Appeals failed to understand the fact that the breadth of the term "stabilization of employment" lies not in the looseness of rhetorical usage, but in the breadth and complexity of those factors which give rise to instability of employment in the first instance.

In practice, stabilization of employment has been a basic warp on which the whole fabric of collective bargaining has been woven. Thus trade unions have developed several

alternative approaches to the problem of providing their members with stability of employment:

First, trade unions have sought explicit recognition by the employer, of the propriety of joint union-management consultations in dealing with the problem of job security and stabilization of employment. This approach establishes the procedural mechanisms by which substantive remedies may be formulated and implemented by both parties.

Second, trade unions have attempted to fix their members' right to specified types of work by the negotiation of clauses which define the bargaining unit, prohibit management from contracting out work, limit the activities of supervisory employees, or spell out the occupational classifications covered by the agreement.

Third, trade unions have aimed at controlling the distribution of available employment opportunity among their members by pressing for shorter hours, provisions concerning the allocation of overtime, and the use of objective criteria, like seniority in determining who shall be laid off.

Fourth, trade unions have developed programs, such as supplemental unemployment benefits and dismissal compensation, which penalize employers for instability of employment and therefore act as a deterrent to layoffs.

And fifth, trade unions have sought to maintain a given level of employment opportunities by bargaining over work crew requirements and the terms of specific employment guarantees on a monthly or annual basis.

The particular approach, or approaches, utilized by a trade union will vary from case to case. Trade union efforts to promote stabilization of employment, like those of the federal government, must be adapted to the circumstances of each situation. Seniority may protect the individual worker from the arbitrary exercise of management's

authority to lay off, but it is an ineffectual stabilizing device, by itself, in coping with major cyclical displacements. Supplemental unemployment benefits may deter layoffs during the downward course of the business cycle, but such programs are not adequate to the task of meeting the challenge of powerful secular factors which have called forth the Telegraphers' contract proposal in this instance. The Court of Appeals has noted with approval that North Western's management has demonstrated a willingness to bargain over supplemental unemployment benefits and related matters. In other words, it has affirmed the bargainingability of programs designed to deal with instability of employment which arises from one set of economic factors, i.e., the business cycle, but has erected a wall of "management prerogatives" around alternate approaches to stabilization of employment which are aimed at the consequences of other causal factors. Such a distinction denies the viability and strength of collective bargaining.

III.

ANALYSIS OF COLLECTIVE BARGAINING PRACTICE IN INDUSTRY IN GENERAL AND THE RAILROAD INDUSTRY IN PARTICULAR REVEALS THAT THE PRINCIPLE OF JOINT DETERMINATION FOR DEALING WITH PROBLEMS OF STABILIZATION OF EMPLOYMENT HAS GAINED WIDESPREAD ACCEPTANCE BY MANAGEMENT.

Numerous collective bargaining agreements, entered into by some of the leaders of American industry, have endorsed the principle of joint union-management determination of solutions for dealing with the problem of achieving job security and stabilization of employment. In this respect, the present contract between the General Electric Company and the International Union of Electrical Work-

ers contains the following clause which not only provides for joint consultation on the issue of employment security but which also specifically reserves to the union the right to strike in the event that no agreement results from the negotiations between the parties. The contract declares that:

"Notwithstanding any other provisions of this Agreement, upon written notice from the Union to the Company not more than 30 days prior to September 1, 1958, collective bargaining negotiations shall commence between the parties on September 1, 1958, for the purpose of considering proposals for contracting with regard to *any questions directly relating to employment security* which may be submitted by either the Union or the Company. If no agreement is reached thereon by October 1, 1958, the Union and its Locals shall have the right to strike over such proposals but the contract shall continue in effect as provided." (Contract expires 9/60.) (Bureau of National Affairs, Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts, Vol. 2, 53: 305, emphasis supplied.)

The recent agreement negotiated by Armour and Company and the two packing house workers' unions further demonstrates the possible breadth of joint consultations devoted to the development of policies which promote employment security. Realizing that momentous changes in technology had generated extreme insecurities for its work force which could not be reached by conventional measures, such as severance pay, Armour did not reject union requests to bargain over stabilization of employment by falling back on arbitrary declarations of management prerogatives. Instead, the company "recognized that these problems require continued study to promote employment opportunities for employees affected by the introduction of more efficient methods and technological change." Armour further agreed to formalize union-management

discussions on this issue by setting up a joint study committee whose activities were to be underwritten by a special "automation fund"**financed by the company. Among other things, this committee will consider "any * * * methods that might be employed to promote continued employment opportunities for those affected." * * * (Exhibit A, Agreement between Armour and Company and United Packinghouse Workers of America and Amalgamated Meat Cutters and Butcher Workmen, effective September 1, 1959.)

Even in the current labor dispute in the steel industry, where the companies up to this time have taken a firm position on "management prerogatives" with respect to work rules, a consensus exists concerning the desirability of joint union-management consultations dealing with programs for stabilization of employment. During the course of negotiations in the steel controversy the employers proposed the establishment of a joint Human Relations Research Committee. Among other things the Committee would—

"* * * plan and oversee studies and recommend solutions of mutual problems in the areas of * * * (G) Employment Stabilization and other problems arising from practice changes to improve efficiency of operations". (Appendix C, Report to the President on the Labor Dispute in the Steel Industry Submitted by the Board of Inquiry Under Executive Orders 10843 and 10848, October 19, 1959).

The willingness of the steel companies to give distinctive organizational form to joint consultations concerning stabilization of employment emphasizes the retrogressive character of North Western's stand on this issue.

In addition to these broad endorsements of the principle of joint consultation to effectuate employment security, specific procedures have been devised through collective

bargaining, which provide for mutual consent or extensive discussions between the union and management before employees within the bargaining unit can be laid off. Thus a recent contract between the International Association of Machinists and the Whiton Machine Company spelled out the following procedure:

"It is further agreed that the company will confer and agree with the Shop Committee before making promotions, permanent transfers, layoffs, separations and discharges for any reason." (BNA 60:11.)

The bargaining agreement between the Michigan Bell Telephone Co. Plant Department and The Communications Workers of America similarly required negotiations during the term of the contract in the event that established provisions governing layoffs were not adequate to meet new situations as they arose. The agreement stated:

"It is mutually agreed after such notification is given by the Company that if the part-time or lay-off procedures provided for in this article do not seem to meet the requirements of the particular situation existing at the time, an attempt will be made to negotiate the necessary amendments. * * *" (BNA 60:11.)

The salutary effects of such managerial willingness to adopt a flexible approach in dealing with the problems attending the displacement of employees has been attested to by a top executive of the Michigan Bell Telephone Company. (Harold Schroeder, Vice-President, Michigan Bell Telephone Company, "Employee and Community Relations Problems Resulting from Technological Development," *Michigan Business Review*, July, 1957). Other major companies, like the Ford Motor Company and the Aluminum Company of America, have also utilized bargaining procedures to handle special problems involved in carrying out layoffs. (BNA 60:12-13.)

In contravention to North Western's assertions, the rail-

road industry has not been insulated from the main stream of collective bargaining developments. Railroad employers, like industry employers, have long accepted the principle of bargaining with unions over the issue of stabilization of employment. In 1932, the twenty-one standard railroad unions, presented a plan for stabilization of employment to a carriers' committee representing major railroad employers in the nation. The unions' plan was designed to afford railroad employees some relief from the instability of employment caused by the depression and further establish a framework for the determination of a long term program of employment security. The unions' immediate proposal called for stabilization of employment by assuring one year of employment to a prescribed number of employees in each class.

During the course of subsequent negotiations on this proposal, the carriers' bargaining committee expressed its sympathetic consideration of the unions' goals, but refused to establish any concrete program for stabilization of employment at that time. Instead, the carriers' committee and the unions entered into a Memorandum of Agreement, effective February 1, 1932, which unequivocally confirmed the Railroad employers' continued willingness to bargain over stabilization of employment through negotiations between individual carriers and the unions which represented their respective employees. The Memorandum of Agreement declared:

"Item 1. It is agreed that whatever may be practicable should be done to remove the feeling of uncertainty as to employment which may exist at the present time in the minds of many who are now employed, either upon a whole time or part-time basis; and that varying conditions make it necessary to deal with this question by local negotiations on each railroad between each participating railroad and its employees, in the usual manner, through each participating organiza-

tion; and that accordingly, *the railroads will carry on negotiations for the purpose of stabilizing employment for such periods and to such an extent as conditions may justify*; it being understood that this agreement does not contemplate assurance of pay for service not performed unless covered by present agreements." (Official Proceedings, Ninth Convention, Railway Employes' Department, American Federation of Labor, April 4-8, 1938, p. 10; emphasis supplied.)

Despite the failure to agree on a specific program for employment security during the 1932 negotiations, the explicit confirmation of the bargainability of the stabilization of employment issue paved the way for future developments in this area. These developments transpired in a climate of public policy which lent support to private measures to cope with the difficulties of employment stabilization.

In 1933, Congress passed the Emergency Railroad Transportation Act (Public Law No. 68, 73rd Congress) in order to encourage, promote or require action on the part of carriers subject to the Interstate Commerce Act which would avoid unnecessary duplication of services and facilities and other wasteful or inefficient practices. Section 7(b) was included in the Act to provide employment security for railroad employees who would otherwise be deleteriously affected by coordinations or unifications of facilities initiated under the authority granted by the statute. Section 7(b) specified that:

"The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the payrolls of the employees in service during the month of May, 1933, after deducting the number who have been removed from the payrolls after the effective date of this Act by reason of death, normal retirements, or resignation, but not more in any

one year than five per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

While Section 7 (b) was designed to give railroad employees substantial protection against the insecurities created by consolidations, the impact of two factors made the provision less than fully effective. First, separations due to attrition could be deducted from the number of employees in service in May, 1933 at a rate of five per cent per year. In most instances of consolidation the number of employees of a single carrier who were affected was expected to be less than the number of deaths, normal retirements or resignations among all the employees of that carrier since the effective date of the statute. Second, Section 7 (b) did not apply to employees who were not on the payrolls in May, 1933, and thus did not provide protection to new employees. Consequently, Section 7 (b) covered a progressively smaller proportion of actual railroad workers. (*Employment Attrition in the Railroad Industry*, Federal Coordinator of Transportation, Section of Labor Relations, 1936, pp. 32-33.)

Dissatisfaction with this arrangement induced the railroad unions to press once again for a program for stabilization of employment through collective bargaining. The Federal Coordinator of Transportation, who occupied an office created by the Act of 1933, viewed this reliance on collective bargaining as "a wise course" and lent the government's research resources to the task of compiling "helpful" information for the parties to the negotiations. (Statement of Joseph B. Eastman, Federal Coordinator of Transportation, in *Employment Attrition in the Railroad Indus-*

try, *supra*, p. ii.) These discussions culminated in the ratification of the landmark Washington Job Protection Agreement of May, 1936. (Agreement of May, 1936, Washington, D. C., between certain Carriers and Twenty-One Organizations of Railroad Employees.) The Agreement covered the employees of over one hundred carriers and included a comprehensive program of procedures, rights and benefits which treat the various unstabilizing effects on employment of "coordinations" involving two or more carriers. The terms of the Washington Agreement have remained in effect to the present day and by 1956 coverage had been extended to include an additional ninety-four carriers. Moreover, the same general approach has been applied by individual carriers to displacements arising from consolidations within single railroad systems. (Cf. Memorandum of Agreement Between the Baltimore & Ohio Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective August 26, 1957.)

The approach to the problem of employment security which was embodied in the Washington Agreement received implicit government approval in Section 7 (f) of the Transportation Act of 1940 (Public Law No. 785, 76th Congress) which amended Section 5 of the Interstate Commerce Act. Section 7 (f) included both substantive protections for workers who were affected by consolidations and also affirmed the desirability of formulating additional remedial measures through collective bargaining. Section 7 (f) reads:

"(f) As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by a railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions pro-

viding that during the period of four years* from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its employees."

In applying this section in specific cases, the Interstate Commerce Commission has avowedly patterned the conditions which it prescribes "to protect the interests of the railroad employees affected" after the provisions of the Washington Agreement. (Employee Protections Imposed by the Interstate Commerce Commission in the *New Orleans Union Passenger Terminal Case*, I. C. C. Financial Docket No. 15920, Decided January 16, 1952). Thus the Washington Agreement grew out of and was encouraged by public declarations which were favorable to the goal of stabilization of railroad employment. And since its ratification, the Agreement has enjoyed the approbation of the government agency charged with implementing national transportation policies.

Other more recent developments have confirmed railroad management's long acceptance of the bargainability of contract proposals concerning stabilization of employment. In the National Agreement of 1956, the carriers explicitly acknowledged the bargainability of stabilization of employ-

* The terms of the Washington Agreement specified a protected period of five years.

ment by excluding this issue from a general clause establishing a three-year moratorium on further demands by either management or the unions. Article VI of the National Agreement declared:

"The purpose of this Agreement is to fix the general level of compensation during the period of this Agreement. Therefore, subject to the provisions of paragraphs (d) and (e) of this Article, no carrier or organization, party to this Agreement, will serve any notice or progress any pending notice to

"(a) Increase or decrease rates of pay established by Articles I, II, III and IV of this Agreement. * * *

"(e) This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment or other matters not prohibited by the foregoing provisions of Article VI." (R. 268-9; emphasis supplied.)

The Chicago and North Western has also given contractual affirmation to the bargainability of employment stabilization by distinguishing this issue from the negotiation of a supplemental unemployment benefits plan covering non-operating employees represented by thirteen labor organizations. In effect, North Western has recognized that efforts to stabilize employment include, but also transcend, the establishment of a supplemental unemployment benefit plan which attempts to cope with insecurity of employment arising from only a narrow range of factors. The relevant portion of the SUB agreement asserts:

"The purpose of this Agreement is to alleviate undue hardship for the interim period, or until the Railroad Unemployment Insurance Act is revised or amended within that period. Therefore, this Agreement is not subject to change or modification during such three (3) year period, nor shall any labor organization or organizations parties hereto during such period serve or progress any notice covering changes in

this Agreement or dealing with stabilization of employment, separation of allowance or other similar requests or demands, unless such requests or demands are served by one or more of the organizations parties hereto on the railroads generally as part of a national or western regional movement in which event any national or western regional agreement reached may at the election of the organization or organizations parties hereto be substituted in its entirety for the protection hereby established in paragraphs 1(a)1 and 1(a)2 hereof. * * * (Memorandum of Agreement Between Chicago and North Western Railway Company and Thirteen Labor Organizations effective May 6, 1956; emphasis supplied.)

North Western has refused to bargain with the Telegraphers over the latter's contract proposal for stabilization of employment, but in the above contract clause it apparently demonstrates its willingness to accept stabilization programs negotiated by *other* carriers as part of a national or regional movement. This inconsistency casts some doubts on North Western's sedulous concern for its "management prerogatives" in its dealings with the Telegraphers.

Beyond such specific recognition of the bargainability of stabilization of employment, one hundred and thirty-five (135) carriers, including North Western, have, in fact, agreed to joint consultation, with a railroad union, over matters arising during the term of the contract which might cause insecurity of employment. On May 22, 1957, the Brotherhood of Maintenance of Way Employees submitted a ten-point proposal to the railroads which aimed at stabilizing employment by regulating changes in track section limits, the use of maintenance-of-way machines, the contracting-out of maintenance of way and structures work and other causes of job insecurity of its membership. (Appendix to Employes' Formal Notice of May 22,

1957; Brotherhood of Maintenance of Way Employees.) The initial reaction of the carriers to this proposal was to question the bargainability of the union's requests. However, with the intervention of the National Mediation Board, as provided by the Railway Labor Act, negotiations over stabilization of employment were carried out and resulted in the following confirmation of the principle of joint consultation:

"Article I—*Prior Consultation.* In the event a carrier decides to effect a material change in work methods involving employees covered by the rules of the collective bargaining agreement of the organization party hereto, said carrier will notify the General Chairman thereof as far in advance of the effectuation of such change as is practicable and in any event not less than fifteen (15) days prior to such effectuation. If the General Chairman or his representative is available prior to the date set for the effectuation of the change, the representative of the carrier and the General Chairman or his representative shall meet for the purpose of discussing the manner in which and the extent to which employees represented by the organization may be affected by such change, the application of existing rules such as seniority rules, placement and displacement rules, and other pertinent rules, with a view to avoiding grievances arising out of the terms of the existing collective agreement and minimizing adverse effects upon the employees involved.

"As soon as is convenient after the effective date of this agreement, and upon reasonable intervals thereafter, the carrier and the General Chairman or his representative will meet informally in a conference to discuss such suggestions as the General Chairman may have to minimize seasonal fluctuations in employment."

(Agreement Between Brotherhood of Maintenance of Way Employees and Carriers Represented by Eastern, Western and Southeastern Carriers' Conference, Entered into October 7, 1959, NMB Case No. A-5987.)

In the light of this record, it is clear that to sustain the position of the Court of Appeals that matters relating to stabilization of employment fall within the purview of management prerogatives would vitiate the force and social usefulness of collective bargaining as it has evolved in this country. The strength of collective bargaining lies not in rigid determinations of bargainability, but in being responsive to changing conditions as they arise in the economy and in individual firms.

IV.

ANALYSIS OF COLLECTIVE BARGAINING AGREEMENTS IN INDUSTRY IN GENERAL AND THE RAILROAD INDUSTRY IN PARTICULAR REVEALS THAT JOB SECURITY AND EMPLOYMENT STABILIZATION HAVE, IN FACT, LONG BEEN OBJECTIVES OF SPECIFIC BARGAINING PRACTICES.

The contractual recognition of the bargainability of employment stabilization analyzed above merely sets the stage for the implementation of specific measures which, in fact, are designed to stabilize employment for given groups of workers. Whether or not the contract contains such a declaratory statement of principle, the bargaining agreement will inevitably encompass numerous provisions which aim at mitigating or controlling instability of employment arising from diverse economic or managerial causes.

As indicated earlier, trade unions have sought to stabilize employment by establishing the right of their members to certain categories of work. A basic step in this direction is the definition of the extent of the bargaining unit with respect to the kinds of work or occupational classifications covered by the collective agreement. A typical clause staking out the extent of the bargaining unit reads as follows:

"For the purpose of collective bargaining with re-

spect to wages, hours and other conditions of employment, the Employers recognize the Union as the exclusive bargaining agent of all employees engaged in manual operations involved in the shipping, receiving, maintenance or in the mixing, preparing, manufacturing or handling of lead, color, oil, lacquer, aluminum, varnish and paint. * * * (United Employers, Inc., and Paint Makers; BNA, 70:122.)

Such a clause may then protect the workers in the bargaining unit, as defined, from the insecurities of employment caused by the exercise of managerial discretion in matters like contracting-out work formerly performed by the plant work force. Where the union protests this action on the grounds that work, and employment opportunities, have been removed from the bargaining unit, it has sometimes been sustained by labor arbitrators. (Cf. Parke-Davis and Company and Allied Trades Council—AFL, *Labor Arbitration Reports*, Bureau of National Affairs, Vol. 15, pp. 111-115.)

To strengthen the claim of employees to given classes of work, a union may negotiate clauses which explicitly limit management's authority to sub-contract or, in other cases, to assign duties usually performed by hourly workers to supervisory employees. A careful survey of collective bargaining practices conducted on a continuous basis by the Bureau of National Affairs disclosed that 37% of the contracts sampled regulated the performance by supervisors of regular duties performed by employees in the bargaining unit, and 15% established some limits on the employer's right to sub-contract. (BNA, 65:24.) The relationship between imposing contractual restraints on management's authority to sub-contract is graphically illustrated by the agreement between the Aircraft Engineering Company and the International Association of Machinists, relating to sub-contracting:

"The Company shall not let a sub-contract on work

customarily handled in the plant, neither shall the Company subcontract while employees are on lay-off status who are capable of performing the work in question." (BNA 65:182.)

The flexibility of collective bargaining in tailoring remedial measures to the specific causes of employment instability is further demonstrated by the expansion of limitations on subcontracting to cover plant relocations as well. In the garment industry, where considerable insecurity has been created by the movement of plants away from traditional manufacturing centers, the International Ladies Garment Workers Union has succeeded in negotiating agreements which require union approval before a facility can be relocated. One such clause states:

"During the term of this agreement the Employer agrees that he shall not, without the consent of the Union, remove or cause to be removed his present plant or plants from the city or cities in which such plants are located." (Clothing Manufacturers Association and Ladies Garment Workers Union, BNA, 65:201.)

In the railroad industry, the so-called "scope rules" have served to establish employees' rights to certain categories of work. Within the context of railroad collective bargaining practice, scope rules define the coverage of specific agreements with reference to the appropriate occupational classifications coming under a union's jurisdiction. A conventional Telegraphers' scope rule reads:

"Rule 1 (a). This agreement shall govern the employment and compensation of:

Agents—Freight and Ticket (as shown in the wage scale).

Assistant Agents—(Freight and Ticket).

Agent—Telegraphers.

Agent—Telephoners.

Telegraphers.

Telegrapher-Clerks.

Telephone operators (except telephone switch-board operators.)

Tower and Train Directors.

Towermen | The term "towerman" is synonymous
Levermen | with "leverman" and both operate
 | interlocking switches on signals from
 | a central point."

(Agreement Between the Chicago, Indianapolis and Louisville Railway and the Order of Railroad Telegraphers, effective May 1, 1953.)

The degree of employment security afforded by a particular scope rule is increased by the inclusion of a supplementary clause which declares that no work described in the scope rule can be removed without mutual consent. Thus, in the agreement cited above, Rule 1(b) gives explicit effect to the designation of the Telegraphers' positions spelled out in the preceding section:

"Unless otherwise agreed to by the authorized representative of the carrier and the duly accredited representative of the Organization, positions and/or work referred to in this agreement belongs to the employees covered thereby and no work of the classifications enumerated in paragraph (a) of this rule shall be removed therefrom except by mutual agreement."

In the adjudication by the National Railroad Adjustment Board of disputes arising under the terms of collective bargaining agreements, the various scope rules have given employees protection against instability of employment resulting from the arbitrary exercise of management authority in ordering the work force. In this manner, the scope rules have protected employees against displacements caused by attempts to consolidate jobs, (Houston Belt & Terminal Railway Company and Order of Railroad Telegraphers, NRAB, Third Division, Award No. 6937, March 29, 1955) assign work customarily done by em-

ployees in the bargaining unit to supervisors, (The Nashville, Chattanooga & St. Louis Railway and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 6141, March 19, 1953) abolish a shift (Chicago & Eastern Illinois Railroad Company and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 6357, October 2, 1953) cancel a "temporary" job, (Gulf Coast Lines and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 3563, May 22, 1947) or abolish a job by transferring some of the work assigned to an employee in one seniority district to an employee in another seniority district. (Reading Company and Brotherhood of Railway and Steamship Clerks, NRAB, Third Division, Award No. 6348, September 29, 1953.)

Scope rules have also been a consideration in efforts to ban the contracting-out of work. Shortly after World War I, the United States Railroad Labor Board on a few occasions sustained railroad union complaints that the contracting out of work usually performed by railroad employees, such as coach cleaning and maintenance of structures, violated their agreements with the carriers. (Decisions of the Railroad Labor Board, Vol. III, pp. 667, 687, 696; Decisions Nos. 1210, 1220, 1226). On a broader front, a union proposal for the discontinuance of the railroads' practice of contracting-out maintenance work was a major issue in the Shop-Crafts strike of 1922. (Harry E. Jones, *Railroad Wages and Labor Relations; 1900-1952*, Bureau of Information of the Eastern Railways, 1953, pp. 78-81.)

Demonstration of the fact that scope rules have, in many situations, provided for stabilization of employment should

not obscure the limited range of application of these provisions. That is, it is obvious that while the scope rules may mitigate marginal cases of instability of employment, they are not adequate to deal with gross displacements. In this event, railroad unions have had to turn to other, more appropriate measures.

Control of the distribution of available employment opportunities offers a broader approach to the problem of stabilizing employment, particularly where job insecurity is associated with cyclical fluctuations in business activity. In this respect, shorter hours of work has been a favored device of trade unions. A trade union economist has pointed out the close connection between proposals for shorter hours and the goal of stabilization of employment.

"The threat of unemployment and the possibility of minimizing it through the adoption of shorter work-weeks, has apparently been the most significant factor until now in generating union efforts to reduce the 8-hour day and 40 hour week. * * *

"* * * where technological and economic developments have threatened displacement of workers, many unions quickly have turned to consider the possibility of shorter hours of work as a means of aiding the stabilization of employment." (Seymour Brandwein, "Recent Developments," in *The Shorter Work Week; Papers Delivered at the Conference on Shorter Hours of Work Sponsored by the AFL-CIO, 1957*, pp. 71-72.)

The demand for shorter hours, as related to efforts to stabilize employment, historically has taken two forms: permanent reductions in the length of the work week, and temporary work-sharing arrangements. Permanent reductions in the length of the work week have, in recent years, reflected statutory endorsement of shorter hours as a device to promote employment stability. Thus the

establishment of effective maximum limits on the work week by National Recovery Administration codes, state legislation and the Fair Labor Standards Act of 1938, was largely motivated by the desire to equalize the distribution of available employment opportunities during the depression. Since that period, the 40-hour work week has become standard for most of American industry, (Joseph S. Zeisel, "The Workweek in American Industry 1850-1956," U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, January 1958, p. 27.)

Temporary reductions in hours of work have been widely used to distribute employment opportunities among workers in industries which are sensitive to seasonal and cyclical fluctuations. Typically, a work-sharing arrangement will call for the reduction in daily or weekly hours of work before any layoffs can be carried out. The stabilizing effect of shorter hours and the consequent work-sharing arrangements have been underscored by a Report of the U. S. Bureau of Labor Statistics.

"For short-time declines in business production, some unions have worked out plans whereby available work is distributed as evenly as possible among all the workers. These share-the-work plans have the effect of deferring lay-offs, or, if production is resumed before too long a time has elapsed, of preventing lay-offs altogether." ("Share-the-Work Provisions in Union Agreements", U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, June, 1940, p. 1340).

This same report indicated that in 1940 approximately 25% of a sample of 7,000 collective bargaining agreements contained some program for shorter hours and work-sharing to help stabilize employment. A later Bureau of National Affairs survey disclosed a similar incidence of work-sharing arrangements in labor contracts negotiated

during recent years (BNA, 60:301). A representative work sharing clause reads as follows:

"*** No regular employee shall be laid off so long as operations permit work-sharing on a 32-hour basis until after such work-sharing has been in effect for not less than five (5) consecutive weeks." (International Shoe Company, Monlinton Tannery and District 50-UMW; BNA, 65:304.)

When layoffs are actually instituted in a unionized situation, they are inevitably carried out with reference to the seniority of the employees involved. Seniority provisions, of course, were originally designed to cope with the problem of employment and job security. (Sumner Slichter, *Union Policies and Industrial Management*, The Brookings Institution, 1941, pp. 115, 122.) As such, they limit the exercise of management discretion and lend a degree of individual security to long service employees. Today, the use of length of service, as a criterion for the distribution of contracting employment opportunity is common in the American industrial relations scene. The Bureau of National Affairs reported that:

"Among contracts which refer to lay-off, seniority is almost always a factor in determining the order of reduction. In almost three cases out of four, it is the governing consideration." (BNA, 60:1.)

Collective bargaining in the railroad industry has been marked by similar attempts to stabilize employment by controlling the distribution of economic opportunity. In 1932, twenty-one unions representing railroad workers sought to negotiate a six-hour day on a national basis in order to spread available employment among their members. (Official Proceedings, Ninth Convention, Railway Employees Department, *supra*, pp. 7-11). When prolonged bargaining brought no agreement on this issue, additional efforts, albeit unsuccessful, were made to establish

the six-hour day on the railroads by congressional statute. (*Six Hour Day For Employees of Carriers Engaged in Interstate and Foreign Commerce, Hearings Before The Committee on Interstate Commerce, United States Senate, Seventy-third Congress, Second session*). Despite these setbacks, the railroad unions continued to press for shorter hours and by 1953, the forty hour week had been put into effect for most rail employees through the application of collective bargaining agreements. (*Jones, supra*, pp. 147-160.)

Work-sharing arrangements also have a venerable history in railroad labor relations. As early as 1912, the Chicago and North Western Railroad entered into such an agreement with shop craft workers as a protection against seasonal instability of employment. Thus, North Western's contract with the Brotherhood of Boilermakers, and Iron Shipbuilders and Helpers, effective December 1, 1912, contained the following clause:

"When it becomes necessary for the company to reduce expenses, the full force of boilermakers and helpers shall be retained and the time reduced to five (5) days per week, eight (8) hours per day; in any further reduction if men are then to be laid off, then the last employed will be the first laid off. (Cited in *Presentation of the Railway Employees' Department of the AFL Before The United States Railroad Labor Board, Chicago, Illinois, Federated Shop Crafts Part Two, Volume One, 1921*).

Besides the widespread use of work-sharing clauses to control the distribution of employment in the pre- and post-World War I period, railroad shop craft workers also sought protection against instability of employment which stemmed from either inept management scheduling of work or the need for emergency maintenance and repair.

of road equipment. Hence, most shop craft agreements specified that:

"When it becomes necessary for employees covered by this agreement to work overtime they shall not be laid off to equalize the time. (Agreement Between Certain Carriers in the Southeast Region and Federated Shop Crafts, effective September 1, 1917.)

The Telegraphers' union has negotiated similar protection against job insecurities which stem from the exigencies or ineptness of managerial decision making. Rule 51 in the agreement between Telegraphers and North Western specifies that:

"A Telegrapher will not be required to suspend work during assigned hours or to absorb overtime." (The scope rule defines "telegrapher" to include all the occupations covered by the agreement.)

The antecedents of this rule may be traced back to the Telegraphers' national agreement negotiated during World War I.

From the foregoing discussion, it is clear that the systematic control of the distribution of employment opportunities has been a widely accepted approach to the problem of employment stabilization. If the Telegraphers' union had submitted a contract proposal calling for a reduction in hours of work of such a magnitude that consequently no employee would be displaced North Western, and the Court of Appeals, could scarcely maintain a position that the issue was not bargainable. Because the union has endeavored to stabilize employment by a more flexible proposal which allows joint discussions between the parties, it has been accused of infringing on management prerogatives. It is apparent that North Western's, and the Court of Appeals' concept of management prerogatives is as

broad as its view of stabilization of employment is narrow.

In addition to the more traditional approaches described above, efforts to promote stabilization of employment have taken a new direction in recent years. That is, since the end of World War II, dismissal compensation, or severance pay, and supplemental unemployment compensation, have come into increased prominence as collective bargaining issues. To be sure, a major objective of both of these programs is to provide a financial cushion for those employees who are permanently displaced or who suffer temporary layoffs. On the other hand, severance pay and supplemental unemployment benefits also have the effect of penalizing the employer for failing to take decisive steps to stabilize employment. Where these financial penalties cancel out, the economic inducements to reduce the size of the work force, a deterrent to displacements will be created and conversely, a premium will be placed on stabilizing employment in given situations. The degree of the deterrent—and effectiveness of the premium—will depend upon the level of benefits prescribed in each particular case. Hence, an alternative approach available to a union which seeks to promote stabilization of employment is to negotiate plans which contain relatively high benefit schedules.

In this respect, a National Industrial Conference Board survey of the operation of severance pay plans in industry has disclosed that employers, in fact, are highly sensitive to the costs of such programs. Thus, employers reported that the major disadvantage of these plans was the cost of financing the benefit payments, especially during times of declining business activity and large scale layoffs. (*Severance Pay Plans*, National Industrial Conference Board, Studies in Personnel Policy, No. 141, 1954, pp. 28-29.) In contrast, a premium for stabilizing employ-

ment is inherent in the provisions of many major supplemental unemployment benefit plans, like those in the automobile and aluminum industries, since they specify maximum limits to the benefit funds. Once these maxima are reached, employer contributions are stopped, and the contributions are resumed when layoffs necessitate the payment of benefits and reduce the level of the funds. (Cf. Supplemental Unemployment Benefit Plan Agreed to by General Motors and the United Auto Workers, BNA, Vol. 1, 20:299; and Supplemental Unemployment Benefit Plan Agreed to by Aluminum Company of America and United Steelworkers of America, BNA, Vol. 2, 56:623.)

The widespread incidence of severance pay and supplemental unemployment benefit plans attests to the prominence of these programs for stabilization of employment, particularly in the basic, durable goods industries which are subject to chronic cycle fluctuations in employment. In 1957, the Bureau of Labor Statistics reported that collective bargaining agreements covering approximately 1,800,000 workers outside the railroad and air transportation industries contained some provision for severance pay. In the last three years, employee anxieties over the impact of technological change on job security has stimulated the wider application of severance pay plans. A recent AFL-CIO study revealed that approximately two million workers have come under such plans since 1956, and that at least 35% of all employees represented by unions are so covered. (BNA, 45 LRR 54; Nov. 1959.) (*Collective Bargaining Clauses: Dismissal Pay*, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 1216, August, 1957, pp. 1-2.) Supplemental unemployment benefit plans also have enjoyed wide acceptance and since the negotiations of the Ford Motor Company—United Auto Worker agreement of 1955 they have spread to the steel, aluminum, agricultural equipment, rubber products, and electrical equipment industries. (BNA, 53:601-705.)

The railroad industry has gained the distinction of pioneering in the development of severance plans in the United States. As early as 1909, the Kansas City Southern Railway Company accepted the principle of compensating employees for displacement by agreeing to assume the financial burden of certain property losses sustained by employees when the company shifted the location of one of its terminals. In 1929, the Pennsylvania Railroad granted dismissal compensation, graduated with years of service, to employees when it abandoned the Baltimore, Chesapeake and Atlantic, and the Baltimore & Eastern railroads. The close connection between severance pay and stabilization of employment was demonstrated by an agreement negotiated by the Baltimore and Ohio Railroad and the unions representing non-operating personnel in January, 1935. The agreement specified that employees no longer needed at certain junctions had the option of choosing either dismissal compensation or guaranteed employment for one year. (Everett D. Hawkins, *Dismissal Compensation*, Princeton University Press, Princeton, N. J., 1940, pp. 165-166.)

These developments set the stage for the Washington Agreement of 1936, noted earlier in a different context. The terms of the Washington Agreement amplified the principle of dismissal compensation to embrace a variety of benefit programs which protected workers from the deleterious effects which the coordination of two railroads might have on their employment status. The Washington Agreement established five categories of compensation:

A coordination allowance: If a man is definitely displaced he is periodically paid compensation amounting to 60 per cent of his average monthly compensation for the twelve months preceding displacement. The duration of

this benefit is determined by the employees' length of service but cannot exceed five years.

A displacement allowance: For a period of five years any employee kept on the payroll of the carrier, but affected by the coordination project, shall not be subject to lower pay. The employee so affected shall be paid the difference between present compensation and compensation received before the consolidation.

A separation allowance: Even if an employee is retained at full pay, he may elect to resign and receive a lump sum payment determined by his length of service and previous compensation.

A transfer allowance: If a man is kept, but transferred because of a coordination, the carrier agrees to pay moving expenses.

A property loss allowance: If the transferred man has to sell his home below its fair market price, the carrier agrees to make up the loss.

The comprehensive character of the Washington Agreement and the scope of the benefits specified therein demonstrates that employment security has long been accepted as a bargaining issue in the railroad industry. It would be specious to deny the union the right to bargain effectively over its contract proposal in this case on the grounds that a consolidation within a carrier rather than between two carriers is involved. Both types of organizational adjustment reflect the impact of a similar complex of secular factors.

As opposed to the long history of bargaining over dismissal compensation, interest in supplemental unemployment benefits is a relatively recent occurrence in the railroad industry. It is significant to note, however, that

North Western was one of the first major carriers to enter into such an agreement with railroad unions. (Memorandum of Agreement Between Chicago and North Western Railway and Thirteen Unions Representing Non-Operating Employees effective May 8, 1956; R. 303.) The Agreement was designed to afford unemployed workers with total benefits including payments under the Railroad Unemployment Insurance system, equal to 75 per cent of "take home" pay and 60 per cent of base pay with a maximum of \$10.20 per day.

The last, and most direct, approach to the problem of stabilization of employment is the negotiation of contract clauses containing specific employment guarantees. This approach has taken two forms: First, work-crew manning requirements may be spelled out by the bargaining agreement. This means that if the Company chooses to carry out certain operations, it cannot reduce labor requirements to a level below that which is prescribed by the contract. In most cases, the size of the work force can be reduced only by displacing entire crews rather than by cutting the size of the crews. Because technological factors surrounding production often make it difficult, if not impossible, to displace entire crews and maintain efficient production, such provisions generally have the effect of stabilizing employment in a narrow range. Second, the employer may be obliged to provide a certain number of employees a minimum number of hours of work, or compensation thereof, for a given time period. This period may be as short as a week or as long as a year. In most situations, employment guarantees have been instituted to safeguard the employees from seasonal fluctuations and further instabilities created by management's failure, or unwillingness, to even out employment opportunities where this is possible.

Work crew provisions in industry generally specify both the size and occupational composition of the crew under consideration. An agreement between the International Longshoremen's and Warehousemen's Union and San Camifta & Sons declares that:

"The basic crew shall consist of ten (10) employees, members of the union, two of which shall be office and clerical employees, which basic crew shall not be reduced during the term of this agreement as extended and renewed. * * *" (BNA, 65:62.)

In addition, it should be noted that other contract clauses which contain explicit manning ratios of employees to machines or which set limits on work loads and speed of operations have an effect on employment stability which parallels that of the work crew provisions; both serve to fix manpower requirements in a given range. (Cf. BNA, 65:121-123.)

Employment guarantees have taken many different forms, from single statements defining the minimum work week to comprehensive programs which afford complete job security over the course of the year. Thus, a typical weekly guarantee clause states:

"All regular employees shall be guaranteed not less than forty (40) hours work per week. * * *" (Owl Drug Company and Teamsters; BNA, 53:101.)

Such minimum weekly guarantees are common in the United States today, particularly in the non-manufacturing sectors. In addition, a few bargaining agreements contain monthly guarantees of minimum hours of work or earnings where the month is the customary time unit for administrative purposes. In this respect, the Flight Engineers, who are also covered by the Railway Labor Act, have negotiated the following monthly guarantee with American Airlines, Inc.:

"In addition to base pay, Flight Engineers who have

completed two (2) years of service with the Company as a Flight Engineer shall receive, as a minimum guarantee for each full calendar month of service, flying pay at their applicable rates of compensation set forth in this Agreement for sixty (60) hours of flying, one-half day and one-half night. * * * (BNA, 53:201.)

Interest in long-range, annual guarantees of employment dates back to the early 1930's when the onset of the depression stimulated more fundamental thinking about stabilization of employment. Further inducement to develop annual employment guarantees through collective bargaining was provided by the Fair Labor Standards Act of 1938. Section 7(b)(2) of that Act grants a partial exemption from the overtime pay requirements to those companies which "as a result of collective bargaining" guarantee employment for not less than 1,840 hours in any consecutive 52 week period. In 1940, the Bureau of Labor Statistics reported that fourteen union agreements included some annual employment or income guarantee. ("Annual Wages and Guaranteed-Employment Plans in Union Agreements," U. S. Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, August, 1940, pp. 283-289.) Since that time programs for the annual stabilization of employment have been established in several additional firms and industries. (BNA, 53:423-603.)

Perhaps the most famous guaranteed employment plan is that included in the agreement between George A. Hormel & Company and the Amalgamated Meat Cutters and Butcher Workmen. The plan, which originated in 1927, guarantees 52 equal pay checks per year to specified groups of employees. (BNA, 53:403-406.) It is noteworthy that the continued success of this plan has been attributable, in a large measure, to management's willingness to discard self-defeating notions of prerogatives and discuss specific administrative problems with the union as they

relate to the effective implementation of the guarantee. (Jack Chernick and George C. Hellieckson, *Guaranteed Annual Wages*, The University of Minnesota Press, 1945, pp. 37-46.)

Historically, in the railroad industry, the negotiation of rules establishing work crew complements have been an integral part of industry bargaining practice. The size of operating crews, in particular, have been subject to continuing union-management determination. The following railroad contract clauses give an insight into the nature and extent of these rules governing crew size and complement:

"When men are available, all crews shall consist of a conductor, listman and two (2) brakemen." (Article 25, The New York Central Railroad, Zanesville and Western Sub-Division of Ohio Central Division, Rules and Rates of Pay for conductors and Trainmen; effective December 1, 1919, revised February 1, 1956.)

"In all yards classed as first class prior to November 16, 1922, a crew shall consist of not less than one foreman and two helpers and no change in present practice of manning yard engines in other yards will be made unless a change in operating conditions, constituting an entirely valid reason, exists." (Rule 0, Agreement between Chicago and North Western Railway and Brotherhood of Railroad Trainmen; covering Yardmen, effective July 1, 1944.)

"Way-freight trains will be manned by three trainmen on the following main lines: Between Chicago and Council Bluffs. Between Chicago and Elroy. Between Chicago and Milwaukee. (Rule 49, Chicago and North Western and Trainmen; *supra*, Road Service.)"

In recent years instability of employment has also caused the Brotherhood of Maintenance of Way Employees to turn to the negotiation of work crew clauses to afford a modicum of job security to its members. (Cf. Agreement Between the Brotherhood of Maintenance of Way Employees and the Reading Company, effective April 19, 1954.) In addition, that union has entered into a contract

with the Detroit, Toledo and Ironon Railroad (effective April 1, 1955) which makes future changes in the number of certain work gangs subject to negotiation. The relevant clause states that the carrier "will not change the number of section and system extra gangs without further negotiations with the General Chairman."

The sensitivity of certain classes of railroad employment to various economic and managerial sources of instability has also stimulated railroad unions to press for formal employment or income guarantees through collective bargaining. In this manner, the operating brotherhoods have frequently negotiated rules which guarantee minimum monthly mileage. The use of mileage rather than hours reflects the unique aspect of the dual wage system in effect in the railroad industry. Such a rule states:

"All regularly assigned firemen and helpers will be guaranteed a minimum of twenty-six hundred miles per month. Any time they may lose on their own account will be deducted from the guaranteed mileage at the rate of one hundred miles for each day lost. This rule applies to an extra fireman or helper representing a regularly assigned fireman or helper a full calendar month." (Rule 38(a), Chicago and North Western Railway, Revised Schedule of Wages and Rules Regulating Employment of Locomotive Firemen, Hostlers and Outside Hostler Helpers, effective November 1, 1951.)

The above rule deserves further attention for the manner in which it distinguishes between instability of employment, arising from personal considerations of the individual employee and other factors outside the employee's control. Thus, time lost by workers "on their own account" may be deducted from the monthly guarantee.

In contrast to the monthly guarantees negotiated by the operating brotherhoods, it was the chronic fluctuation of employment from one month to the next which caused the

federated shop crafts to seek annual stabilization of employment in the Seaboard Airline Railroad Company. Shop craftsmen employed by this railroad suffered severe instability of employment because of sharp seasonal fluctuations in the movement of traffic and the managerial practice of budgeting maintenance and repair work on a monthly basis. Accordingly, in 1928, the federated shop crafts entered into a minimum force agreement with the carrier, whereby the carrier guaranteed a full year's employment to a specified number of workers distributed among the different crafts. The size of the minimum work force has been renegotiated each year and in 1959 covers 1,646 positions. (Agreement Between the Seaboard Air Line Railroad Company and the Federated Shop Crafts Providing for Minimum Force During the year 1959.) Since 1931, renegotiation of the minimum force requirement has been permitted in mid-year on the initiative of either party after January 31. As testimony to the good faith which has marked the administration of this plan, the minimum force requirements were changed in mid-year only three times between 1931 and 1947, when the railroad industry underwent major fluctuations in activity. (*Afros, supra*, pp. 167-171.) Moreover, both the union and management have agreed in their favorable evaluation of the operation of this plan..

"Management officials stated that the minimum force plan has increased worker productivity by reducing fear of layoff. ***"

"Both management and the union stated that the plan had been advantageous for all concerned. The Company saved money, productivity increased, and labor turn-over and training costs decreased. Employees annual earnings increased and the spread of the work induced greater regularity of employment and wages." (*Afros, supra*, p. 181.)

While the Chicago and North Western never progressed to the point of establishing a formal employment guarantee, it is significant to note that this carrier long ago pledged itself to the development of a program for stabilization of employment as part of a broad venture in union-management cooperation. In 1925 North Western entered into a formal program of cooperation with the federated shop craft unions. This plan was in effect until 1929 and dealt with a wide range of issues concerning shop layout, expenditures for equipment and capital improvements and other matters. (Louis A. Wood, *Union-Management Cooperation on the Railroads*, Yale University Press, 1931, pp. 97-99, 133-180.) More to the point in this litigation, as an important element of the plan for cooperation, North Western pledged that "a minimum standard force would be established on its lines." (*Ibid.*, p. 218.)

The threats to stability of employment posed by consolidation of the facilities of single carriers has caused railroad unions to turn pragmatically to other measures to guarantee employment. When the Kansas City Terminal Railway Company announced that it was going to consolidate certain clerical work in an IBM machine center, the Brotherhood of Railway and Steamship Clerks negotiated an agreement with the carrier which specified that any reductions in force arising from this action would be accomplished by normal attrition. The agreement states:

"Reduction in force in the Audit Department resulting from the establishment of the machine bureau will be accomplished by normal attrition in the force of the employees, having seniority in the department on the date of this agreement." (Effective August 14, 1957.)

In other words, the present employees were indefinitely protected from possible displacement as a result of the installation of the new equipment. Only as those employees with seniority resigned, died or retired could particular

positions be abolished. Through collective bargaining, the carrier was brought to recognize its responsibilities not only to the abstract compulsions of "management prerogatives", but the concrete needs of its employees as well.

Finally, it must be noted that the particular proposal of the Telegraphers in the instant case is no more novel than other agreements concerned with stabilization of employment and job security. To begin with almost all collective agreements in the railroad industry contain provisions requiring a period of notice prior to job abolition, and railroads thereby have recognized that job abolitions constitute a subject for collective bargaining. Management's "right" to abolish positions was first limited in a more comprehensive manner over 35 years ago by a rule providing:

"Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules." (Rule 84 of the Agreement between the Delaware, Lackawanna & Western Railroad Co. and the Brotherhood of Railway and Steamship Clerks, cited in Doc. No. 2238, U. S. Railroad Labor Board, 5 R. L. B. 241, March 12, 1924.)

Although the foregoing rule may not have had stabilization of employment as its primary objective, it nonetheless makes clear that job abolition has long been and is a bargainable issue and not subject to the whim of "management prerogatives."¹

More importantly, over twenty years ago the Telegraphers negotiated a rule which, although limited to station agents is in substance identical to the one it has proposed to North Western here. The rule reads:

"2. The status of the part time stations now existing will not be changed except that those to which the agents travel may be made prepaid stations at the discretion of the Company."

"3. Hereafter agencies will be discontinued only by negotiation and agreement between the General Manager and the General Chairman, except as provided in Item 2." (Letter Agreement between the Lehigh Valley Railroad Company and the Order of Railroad Telegraphers, May 18, 1938.)

The continuity of such efforts to stabilize employment by preserving employment opportunities was further indicated when, as recently as 1957, the Great Western Railway Company and the Missouri-Kansas-Texas Lines agreed with the Railroad Yardmasters that positions will not be abolished during the life of the agreement except by negotiation and agreement between the parties.

"Carrier agrees to maintain during period provided in Article III of the Agreement of May 3, 1957, the Yardmaster positions assigned as of the date of this agreement, unless business conditions justify further reductions—in which event the Carrier will negotiate agreement with the Railroad Yardmasters of America before such reductions are effected." (R. 346-349.)

From this examination of collective bargaining practice in industry in general and the railroad industry in particular it is apparent that there is no single path to stabilization of employment. The wide choice of alternative approaches to this problem was plainly stated in the pathbreaking Latimer report,

"Substantial security of income or employment, or both is everywhere more and more recognized as a primary goal of modern democratic societies. This goal cannot be achieved by any one method. In all modern societies many institutional arrangements, programs and procedures have been adopted, designed to contribute to stability of income or employment." (Guaranteed Wages, *supra*, p. 429.)

Among the various institutional arrangements and procedures available to a democratic society for the resolution of the problem of employment, security, collective bargain-

ing has proven its capacity to satisfy the needs of the parties immediately concerned. Well-established collective bargaining procedures, endorsed by the Railway Labor Act have at all times been equally available to North Western in considering the Telegraphers' proposal for stabilization of employment.*

V.

COLLECTIVE BARGAINING HAS BEEN A CONCOMITANT OF ECONOMIC PROGRESS IN THE RAILROAD INDUSTRY. AFFIRMATION OF THE DOCTRINE OF THE COURT OF APPEALS WOULD MATERIALLY IMPAIR THE BARGAINING PROCESS.

Both North Western and the Court of Appeals have implicitly linked the unrestrained exercise of "management prerogatives," with efficiency and economic progress. Hence, the Telegraphers' contract proposal is decried because it would purportedly nullify the economies and efficiencies flowing from certain major organizational changes in the operation of the North Western Railway. In a similar manner, almost any union proposal arising in a vigorous collective bargaining relationship could be characterized as an attempt to fetter management prerogatives and constrain the forces of economic progress.

Such a position cannot be maintained on either philosophical or empirical grounds. First, a democratic society does not blindly worship considerations of economic efficiency alone. Beyond the arithmetic computations of an increasing gross national product lies the additional problem of determining how the fruits of increased production and the consequent burdens of technological unemployment are to be distributed among employees, employers and other major groups in society. Collective bargaining has been endorsed as a matter of national policy because of its proven capacity to accept economic progress while tempering the impact of these advances on the worker.

Second, the historical record of economic activity in the railroad industry reveals that, in fact, collective bargaining has been the concomitant of prodigious increases in productivity. Between 1920 and 1957 railroad employment declined by more than 50 per cent while "production," calculated in terms of revenue traffic units, reached new highs for the period. These gains in labor productivity, which have taken place in a context of collective bargaining, are set forth in the following table:

Year	Number of Employees	Revenue Traffic Units Thousands	Employment Per Million Traffic Units
1920	2,022,832	504,003,546	4.01
1930	1,487,839	437,079,238	3.40
1940	1,026,848	420,777,915	2.44
1945	1,419,505	864,435,209	1.64
1950	1,220,401	652,097,758	1.87
1956	1,043,447	703,446,897	1.48
1957 Preliminary	984,784	669,900,000	1.47

Source: Interstate Commerce Commission Statistics of Railways in the United States, Statements M-300 and M-220. The statistics for each year from 1920 to 1957 are set forth in Exhibit 17, Hearings before the Subcommittee on Surface Transportation, *supra*, Part 4, p. 2052.

Despite this auspicious record of technological progress which has taken a heavy toll of aggregate railroad employment, the Court of Appeals has sought to revive archaic notions of inherent management prerogatives by making ill-founded determinations of the non-bargainability of union proposals. Affirmation of this doctrine would contravene the history of collective bargaining as it has developed under the Railway Labor Act and would strike a severe blow at the effective operation of the bargaining process.

Throughout the many years of collective bargaining which followed the passage of the Railway Labor Act, the

parties have, by their conduct, given meaning and life to the express language of the statute, imposing the obligation upon them to bargain on all matters in order to maintain peace in an industry vital to the nation's welfare. In this period, railroads and unions have bargained about a wide variety of subjects touching every aspect of the employment relationship. As indicated earlier, job security has been a pervasive issue in railroad collective bargaining. Non-bargainability was advanced nationally as a legal justification for refusing to adhere to the provisions of the Railway Labor Act only as recently as 1953. In that year, the Employees' National Conference Committee representing all the non-operating brotherhoods asked certain railroads to negotiate the provisions of a health and welfare plan. Instead of bargaining collectively on this matter, the Carriers' Conference Committees representing generally the Class I railroads in the country filed a declaratory judgment action seeking a court determination that the subject was not bargainable under the Railway Labor Act. The District Court for the Northern District of Illinois, Eastern Division, dismissed the action as not presenting a justiciable issue. The Court of Appeals for the Seventh Circuit reversed this judgment, one of the judges dissenting.*

This Court vacated the judgment of the Court of Appeals and ordered the action dismissed as moot when it appeared that pending ruling on the Petition for Certiorari practically all of the railroads involved had entered into an agreement providing for a health and welfare program.**

Coincidental with the instant case, railroad management has apparently adopted a widespread policy of raising the

* *The Akron, Canton & Youngstown Railroad Co. v. C. R. Barnes*, 215 F. 2d 423 (C. A. 7, 1954).

** *Barnes v. Akron, Canton & Youngstown Railroad Co.*, 348 U. S. 893 (1954).

question of bargainability as a device to relieve it of the necessity for negotiating with the union over matters of paramount importance. A partial survey of the experience of the standard railway labor organizations discloses that since 1956 railroad management has, on over fifty known occasions, balked at negotiating with the union on the grounds that the specific issue pressed by the union was non-bargainable under the provisions of the Railway Labor Act. The accompanying table shows the increased incidence of this tactic and the kinds of issues which have failed to meet management's sterile definition of bargainability. Despite years of collective bargaining over the subjects involved railroad management now finds severance pay, procedures for handling grievances, contracting out, the rates of pay for operators of new machines, the details of health and insurance plans, reduction in hours, and the checkoff of union dues to be unsuitable topics for collective bargaining. In several situations the carrier unilaterally cancelled an existing article of the collective agreement and refused to entertain the union's protest on the ground that the issue was non-bargainable. Thus, in recent years, the concept of non-bargainability has been so extended by management as to throw a cloud over all bargaining subjects except wages in the narrow pecuniary sense of the term:

In some situations, like that involving the 1957-1959 negotiations between the Brotherhood of Maintenance of Way Employees and various carriers throughout the nation, management has agreed to bargain over a given union proposal without receding from its stand that the subject matter of the proposal is "non-bargainable" under the Railway Labor Act. Resort to such a tactic casts in sharp relief the enervating effect which the Court of Appeals' doctrine would have on the collective bargaining process. During the course of these conditional nego-

Instances Where a Carrier Asserted That Subject of Employees' Notice Was Not Bargainable Under the Railway Labor Act:

Organization	Date of Notice	Carrier	Subject of Notice
Certain Standard Railway Labor Organizations	January 16, 1953	Union Pacific System	Revision of Hospital Ass'n Plan to provide coverage for retired employees
Switchmen's Union of North America	October 1, 1953	Carriers generally throughout U. S. on which organization holds representation	Health and Welfare Insurance Plan
Brotherhood of Locomotive Engineers	January 9, 1954	Central of Georgia	Carrier unilaterally changed certain train assignments of employees
(3) Brotherhood of Locomotive Firemen and Enginemen	May 5, 1954, cancelled on July 11, 1955; New Notice filed July 11, 1955	Lake Terminal Railroad	Company unilaterally changed working conditions and job content without notice or agreement by installing radio-telephone equipment on locomotives and requiring engine crews to handle same
Brotherhood of Maintenance of Way Employees	April 2, 1955	Carriers generally	Employee and employer contributions to the cost of hospital and medical insurance programs
Brotherhood of Locomotive Firemen and Enginemen	April 26, 1956	Louisville & Nashville Railroad	Rule providing for payroll deductions for periodic union dues, initiation fees, assessments and insurance premiums where included in monthly dues
Brotherhood of Railway & Steamship Clerks	September 21 and 24, 1956	Pullman Company (5), Pennsylvania Railroad and New York New Haven & Hartford	Protection of the interests of employees in case of termination, cancellation or modification of any contract by the Pullman Company and other railroads, or resulting from abandonment, transfer, consolidation or merger
Brotherhood of Locomotive Engineers	September 27, 1956	Central of Georgia	Carrier filed 30 day notice of cancellation of a provision of the existing agreement. Carrier asserted Section 8 notice not required. Therefore it did not have to bargain

Organization	Date of Notice	Carrier	Subject of Notice
Brotherhood of Locomotive Engineers	January 29, 1957	Atchison, Topeka & Santa Fe	Supplemental Annuity Plan
Brotherhood of Locomotive Engineers	February 13, 1957	Central of Georgia	Carrier filed 30 day notice of cancellation of a provision of the existing agreement. Carrier asserted Section 6 notice not required; therefore it did not have to bargain
Brotherhood of Railway & Steamship Clerks	March 5, 1957	The Troy Union Railroad Company	Protection of interests of employees effected by curtailment of service of the Company
(1) Brotherhood of Maintenance of Way Employees	May 22, 1957	Carriers generally throughout U. S. on which organization holds representation	Minimization of seasonal fluctuations in employment through periodic conferences with organization representatives
(1) B. M. W. E.	May 22, 1957	Carriers generally	Prior notice, conference and agreement upon changes in work methods that would change working conditions of employees
(1) B. M. W. E.	May 22, 1957	Carriers generally	Prior notice, conference and agreement upon changes in track section limits
(1) B. M. W. E.	May 22, 1957	Carriers generally	Prior notice, conference and agreement upon details of operations involved in establishment of mechanized track gangs
(1) B. M. W. E.	May 22, 1957	Carriers generally	Agreement upon rate of pay for, and method of filling positions of machine operators before new machines are put into service
(1) B. M. W. E.	May 22, 1957	Carriers generally	Management to furnish schedule of current agreed upon rates of pay for all positions covered by the contract
(1) B. M. W. E.	May 22, 1957	Carriers generally	No contracting out of work covered by agreement except by agreement with organization representative

Organization	Date of Notice	Carrier	Subject of Notice
(1) B. M. W. E.	May 22, 1957	Carriers generally	Severance pay for employees adversely affected by force reductions or changes in work methods
Brotherhood of Locomotive Engineers	September 26, 1957	Chicago, Minneapolis, St. Paul & P. Railroad	Notice for reprint of schedule
(2) Brotherhood of Railway and Steamship Clerks	February 11, 1958	Boston and Maine RR.	Substantially identical to proposal in case at bar
Brotherhood of Locomotive Engineers	March 19, 1958	Louisiana & Arkansas R. R.	Carrier unilaterally established inter-divisional runs. Asserted subject was not bargainable
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Substantially identical to proposal in case at bar
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Rule governing procedure and pay for time lost in discipline cases
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Rule governing procedure and pay for time lost in physical examination.
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Rule governing handling of communications governing train movements
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	May 22, 1958	Southern Ry. System Lines	Conferences and special Boards of Adjustment to handle grievances
Brotherhood of Locomotive Engineers	May 31, 1958	Chicago & Eastern Illinois R.R.	Rule providing that engineers not required to operate without firemen
(5) Brotherhood of Railway & Steamship Clerks	June 23, 1958	Chicago, Milwaukee, St. Paul & Pacific Railroad	Protection of interest of employees affected by transfer of operation

Organization	Date of Notice	Carrier	Subject of Notice
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Mutuality and uniformity in application of rules governing time limits on handling claims and grievances
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Collective agreement to constitute entire contract governing terms and conditions of employment; agreed upon form of application for employment; preference for employment of experienced employees regardless of age
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Carrier to provide at all locations such physical operational and employment conditions as will assure to the greatest degree practicable under the circumstances the safety, health, comfort and convenience of the employees
Eighteen Standard Railway Labor Organizations Affiliated with Railway Labor Executives' Association	September 10, 1958	Carriers generally	Establishment of plan for compensation of employee injuries, sickness and deaths
Brotherhood of Railway & Steamship Clerks	September 22, 1958	Southern Pacific Southern Lines	Plan for employment stabilization including period of protection, rehabilitation period and severance allowance
Brotherhood of Locomotive Engineers	November 1, 1958	Union R. R. (Pittsburgh)	Carrier unilaterally changed job requirements of Hot Metal Crews. Asserted issue not subject to Section 6 Notice
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Rule governing contracting out of work coming within the scope of the agreement
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Rule establishing procedures for investigation, handling of grievances
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Rule governing handling of communications governing train movements

Organization	Date of Notice	Carrier	Subject of Notice
Fifteen Standard Railway Labor Organizations	January 9, 1959	Chicago & Northwestern Railway Co.	Conferences and Special Boards of Adjustment to handle grievances
Brotherhood of Locomotive Firemen and Enginemen	February 1, 1959	Des Moines Union Railway	Rule governing procedure and pay for time lost in physical examination; right of employee to secure independent and disinterested medical examiner in the event he is disqualified from work by company examination
Seven Standard Railway Labor Organizations affiliated with Railway Labor Executives' Association	February 20, 1959	Central of Georgia	Rule providing for pay for attending rule-book and physical examinations
(5) Brotherhood of Railway & Steamship Clerks	February 20, 1959	St. Paul Union Depot Company	Prohibition against supervisors doing work of employees under agreement
Brotherhood of Railway Signalmen	April 2, 1959	Chicago & Eastern Illinois Railroad	Rule requiring that motor cars be equipped with proper communication equipment and operated on orders and within limits to avoid accidents
Brotherhood of Locomotive Firemen and Enginemen	April 4, 1959	Aliquippa & Southern Railway Co.	Company unilaterally changed working conditions and job content without notice or agreement by installing radio-telephone equipment on diesel and requiring engine crews to handle same
(5) Brotherhood of Railway & Steamship Clerks	April 4, 1959	Lehigh Valley Railroad	Reduction in work day for general office forces
(5) Brotherhood of Railway & Steamship Clerks	April 4, 1959	Lehigh Valley Railroad	Provisions for notice and consultation for displacements of employees due to merger, consolidation, coordination, abandonment, transfer, etc.
Brotherhood of Locomotive Engineers	April 8, 1959	Southern Pacific-Pacific Lines	Construction of suitable facility to provide accommodations for employees during lay-overs

Organization	Date of Notice	Carrier	Subject of Notice
Order of Railway Conductors and Brakemen	April 15, 1959	Southern Pacific Co.	Construction of suitable sleeping accommodations for employees for use in lay-overs
Brotherhood of Locomotive Engineers	April 28, 1959	New York Central System	Maintaining minimum temperature levels in diesel locomotive cabs
Order of Railroad Telegraphers	May 5, 1959	Southern Pacific Lines-Texas & New Orleans R. R. Company	Severance pay plan for employees adversely affected by reductions in force
Order of Railroad Telegraphers	May 14, 1959	Atchison, Topeka & Santa Fe Ry. Co.	Revision of scope rule to include certain classes of work, prevent unilateral removal of positions and/or work from job classifications specified in scope rule; additional proposal substantially identical to proposal in case at bar
Order of Railroad Telegraphers	June 2, 1959	Chicago & Eastern Illinois R. R.	Rule governing consolidation of separate jobs covered by agreement
(4) Order of Railroad Telegraphers	June 2, 1959	Chicago & Eastern Illinois R. R.	Severance pay plan for employees adversely affected by reduction in force
(4) Order of Railroad Telegraphers	June 2, 1959	Chicago & Eastern Illinois R. R.	Rule preventing unilateral removal of positions and/or work of employees covered by jurisdiction of the Organization
Brotherhood of Locomotive Engineers	July 7, 1959	New York Central System	Rule permitting use of visual contact lens and hearing aids by employees
(4) Brotherhood of Railway & Steamship Clerks	July 10, 1959	Central of Georgia	Agreement to protect interests of employees when the carrier introduced electric machines to perform clerical work
Eleven Standard Non-Operating Railway Labor Organizations affiliated with Railway Labor Executives' Association	September 1, 1959	Carriers generally	Improvement and extension of hospital, surgical and medical protection; group life insurance

Organization	Date of Notice	Carrier	Subject of Notice
Brotherhood of Locomotive Firemen and Enginemen	September 9, 1959	Missouri Pacific Railroad Co. (Gulf District)	Rule providing for payroll deduction plan for employees participating in the Blue Cross-Blue Shield Health Security program
Railroad Yardmasters of America	October 1, 1959	Carriers generally	Sickness insurance supplemental to railroad Unemployment Insurance Act
Four Standard Operating Railway Labor Organizations affiliated with Railway Labor Executives' Association	October 1, 1959	Union Pacific Railroad Co. (Northwestern District)	Rule permitting use of visual contact lens and hearing aids during physical examinations
(5) Brotherhood of Locomotive Engineers	October 30, 1959	Monongahela Connecting Railroad	Cost-of-living adjustments, daily rates, premium pay, shift differentials, holidays, vacation plan, health insurance and pension benefits

(1) The dispute arising from this group of proposals was disposed of by Mediation Agreement of October 7, 1959, NMB Case No. A-4987, on terms much less favorable to the employees than those contained in the original proposals after the National Mediation Board persuaded carrier representatives to confer without receding from their basic position that the proposals were "non-bargainable". The disposition exemplifies both the fact that proposals are the starting point for, not the end of, collective bargaining, and the impact of the decision below in loading the scales on the management side.

(2) The dispute arising from this proposal was disposed of on terms substantially less favorable to the employees than those contained in the original proposal after a strike had been called and while proceedings to enjoin the strike were pending in United States District Court for Massachusetts.

(3) Lake Terminal Railroad attempted to seek relief in court after the General Chairmen of the BLF & E and BRT instructed their members to refrain from using radio equipment. The carrier started litigation May 11, 1954. A Mediation Agreement (Case No. A-4931) was reached between the parties on September 15, 1955. The Agreement provides for removal of radio-telephone equipment from locomotives and withdrawal of pending litigation by the Lake Terminal Railroad.

(4) Carrier declared that portions of the organization's proposals were non-bargainable but did not enumerate specific issues.

(5) Carrier reserves the right to question the bargainability of any proposal included in this list.

SOURCE: Reports provided by the officers of the indicated Railway Labor Organizations, from an examination of their correspondence.

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OCTOBER TERM, 1955.

No. 100

**THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,**

Petitioners,

vs.

**CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,**

Respondent.

RESPONDENT'S BRIEF ON THE MERITS.

CASE, McGOWAN,
JORDAN JAY HINZMAN,
400 West Madison Street,
Chicago 6, Illinois,
Attorneys for Respondent.

EDGAR VANDERKAM, JR.,
ROBERT W. BONNER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 100.

THE ORDER OF RAILROAD TELEGRAPHERS,
A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners.

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS.

STATEMENT.

This is a lawsuit between Chicago and North Western Railway Company ("North Western") and The Order of Railroad Telegraphers ("ORT"). The issues it raises are shaped by the facts of record. The ORT's brief is, however, strikingly preoccupied with "unions" and "employers" in a broader setting not defined by a judicial record. The ORT's statement of the case thus omits all reference to those facts in the record which bear most heavily on whether *this union* is precluded from striking *this employer* on the facts of *this record*. These omissions are especially significant in terms of (1) the direct relationship shown by the record between the ORT's demand and North Western's Central Agency Plan as approved by the regulatory

commissions of South Dakota, Iowa, Minnesota, and Wisconsin; and (2) the efforts made by North Western to bargain about the Plan upon any basis other than the veto power over it sought by the ORT as a hedge against its failure to persuade the regulatory commissions to reject the Plan on its merits.

Preliminarily, it should be noted that no effort was made to challenge the evidence of record with respect to the seriousness of the interruption to interstate commerce, and the consequent adverse effect on the public, of the proposed strike, or of the irreparable injury to North Western. A major interstate carrier in nine states, North Western also transports over 80,000 commuter passengers in the Chicago area each work day; and the stoppage of its operations would paralyze the downtown Chicago area and other parts of the metropolitan community (R. 77-79). As the largest switching railroad in Chicago, to which many thousands of plants and factories look for rail service in either originating or terminating traffic, a strike would have had immediate and lasting effects on the operations of these industries (R. 78). And not only would Chicago have been affected, but also the rural territories in the large grain-growing area dependent on North Western, as well as the iron ore country to the North which looks to North Western for dock and ore hauling services (R. 80-81). Within North Western's own family of approximately 18,000 employees, payrolls of \$330,000 a day would cease; and the daily revenue loss to North Western was estimated at \$650,000 (R. 81). Diversion of traffic inevitably takes place during a strike, and much of the traffic so diverted is permanently lost to the rail carriers (R. 81).

1. The Relationship of the Demand to the Central Agency Plan.

(a) The Background of the Central Agency Plan.

On April 1, 1956 North Western acquired a new management (R. 75-6). The first quarter loss had been \$8,000,000, and the cash position was deteriorating so fast as to place the payrolls in jeopardy (R. 82). A principal reason for this was that North Western had lagged badly in the adaptation of its operations to new and changed conditions, with the result that it had the worst (i.e., the highest) ratio of wage and salary expense to the revenue dollar of any railroad (R. 84). It was still operating with 260 steam engines; cars in need of repair were standing idle all over the line; and the right of way was in such bad condition that North Western was not competitive on freight schedules. There was a declining amount of business to the inevitable detriment of everyone connected with the railroad—management, labor and the public (R. 82-83).

The railroad business, no longer a monopoly, has radically changed and is today one of the most highly competitive businesses in the United States (R. 84). Railroads are competing with pipelines, barges, trucks, buses, airplanes and private automobiles, and with each other (R. 84). Additional costs, attributable to inefficient operations, can no longer be passed on to the public in the form of higher rates; and, in fact, North Western has been acting to reduce rates on grain, coal, and other items important to the territories served by it (R. 84-85). Railroads in general, and North Western in particular, must be concerned with constantly increasing productivity and with eliminating waste and inefficiency wherever found (R. 84-85).

The new management took many steps to improve the physical condition and the competitive position of the rail-

road (R. 83-88). But this modernization served to make new jobs as well as to eliminate old ones. North Western installed an electronic system which enables it to determine at any moment the location of its freight cars; and this created a number of new positions for members of the ORT (R. 86).¹ Many of the reductions in personnel incident to modernization programs have not been net reductions in force, because the funds saved from the elimination of wasteful practices have been diverted to useful projects. The effort has been to root out waste and to transfer the dollars saved to expenditures which will enable North Western to do a better transportation job at a cheaper price (R. 87-88). There has, of course, been a substantial net reduction in the number of North Western's employees, but the essentiality of this in staving off bankruptcy is demonstrated by the fact that, because of wage increases, North Western's annual payrolls were \$16,000,000 larger at the time of this litigation than they would have been on April 1, 1956, assuming the same number of employees on both dates (R. 87).

1. North Western placed in evidence (R. 296-8) a compilation of ORT positions abolished, and those newly established, since December 3, 1957. Excepting those positions affected by reason of the Central Agency Plan, this shows a net increase. In his testimony Mr. Leighty, President of the ORT, referred vaguely to the "slaughter" of 100 jobs over and above those involved in the Central Agency Plan (R. 120). When pressed on cross-examination, he could not identify these jobs with any precision (R. 141-2, 322); and the only specific occasion of job losses he cited was the taking over by North Western of the operation of its wholly-owned subsidiary, the Omaha. This consolidation through lease had been approved by the Interstate Commerce Commission in December, 1956, a year before the demand; and in that proceeding the Railway Labor Executives' Association, of which Mr. Leighty is also President, withdrew its opposition in consideration of North Western's agreeing to observe the so-called Oklahoma Conditions (R. 323). On cross-examination, Mr. Leighty said that he could not remember this agreement (which presumably made him a party to the "slaughter") (R. 142). The Oklahoma Conditions protect employees for four years against adverse effects (R. 142-3).

North Western was laid out in the '50's, '60's and early '70's of the last century when there were no hard roads, automobiles or telephones. In consequence, the stations were laid out a short distance apart, according to the length of time it took a farmer to carry a load of grain by horse over dirt roads to the station and to return home in one day (R. 88-90). Since then there has been a transportation revolution. The hard road and automobile appeared; and the telephone has enabled customers to do business with the railroad stations without the necessity for traveling to the station (R. 88).

On April 1, 1956, there were several hundred stations where only one man was on duty (R. 88-89). Many of these stations were on branch lines from which passenger trains had disappeared; and at many of them the freight trains passed at hours when the agent was not even on duty because of an ORT requirement that each agent's day of service must begin at 8:30 a.m. (R. 89, 187). Studies were made at these stations and it was found that in many instances North Western was paying a station agent a full day's pay for 12, 15 or 30 minutes' work, and in certain cases as much as \$300 for each hour actually worked, whereas at the same time North Western was starving for funds to plow back into its system in the form of roadway improvement and maintenance, new equipment, and other modernization programs (R. 89).

(b) The Development of the Central Agency Plan.

North Western formulated a program—the Central Agency Plan—which recognized these changed conditions. After a careful individual study of each agency station, North Western established a central area station, extending the service area of the agent at that station to a neighboring station or stations within a feasible service area, taking into account the hard road, the telephone and the

automobile (R. 89-90). The agent at the central agency station goes to the associate stations by automobile, the railroad paying him mileage. The shipper still gets substantially the same agency service that he would have if the agent were there all the time. Instead of calling the agent four blocks away by telephone, he calls him four miles away at North Western expense (R. 90).

(c) **The Response of the State Commissions to the Central Agency Plan.**

North Western presented petitions to effectuate the Central Agency Plan to the public utility commissions of South Dakota, Iowa, Minnesota and Wisconsin. The South Dakota case was the first filed, on November 5, 1957 (R. 90, 91).

Hearings were held before the South Dakota Commission at various points throughout the state beginning November 26, 1957 and ending January 17, 1958 (R. 178). The ORT appeared in those proceedings to protest the granting of the authority sought, presented evidence, and, at the conclusion of the hearings, filed a brief and participated in oral argument before the Commission. On May 9, 1958 the Commission entered an order not simply authorizing the program but directing North Western to put it into effect forthwith (R. 172-211). The Commission concluded from the evidence that the Plan did not involve the abandonment of any station or the withdrawal of the agent therefrom, and that, accordingly, it did not come under the provision of the statutes relating to these matters (R. 188). It elected to enter its order under another section of the South Dakota statutes which authorizes the Commission on its own motion to order, as distinct from merely to authorize, changes in station operations where necessary or desirable in the public interest. The Commission noted that the expenses of the stations in question exceeded the related revenues by \$170,369 in 1956, whereas if the Central

Agency Plan had been in effect there would have been a surplus of \$58,884 (R. 182). The Commission found (R. 192) that the agent's work load varied from 12 minutes per day at Farmer, South Dakota, to two hours per day at Oneida, with an average work load of only 59 minutes per station at the 69 subject stations. The Commission further found (R. 192):

"That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need, constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates, * * *."

The ORT has tried to suggest that the South Dakota Commission, in its disposition of applications for rehearing, modified in some manner the mandatory character of its order. This is not the case. In its order denying rehearing (R. 340-42) the Commission said that it was "important to re-emphasize the precise nature of the Order it has entered. What it has done is to authorize and direct the carrier forthwith to place in effect the Central Agency Plan; and, pending further report by the carrier as to the actual operation of this Plan, it has deferred action upon the carrier's request for authority to abandon entirely the stations in question."¹ The Commission noted that the applications for rehearing had been founded in large part "upon alleged contractual limitations upon the carrier which, if they do in fact exist, might interfere seriously with the economies and efficiencies to be realized by the carrier through the Central Agency Plan."² The Commis-

1. Emphasis is supplied throughout this Brief.

2. As the Court of Appeals notes in its opinion (R. 379), throughout the state commission proceedings the QRT asserted that the Central Agency Plan could not be effectuated under the limitations of its existing contracts with North Western. North Western has denied that this is so; and this issue as to the applica-

sion expressly disavowed any intent or purpose to interpret the existing agreements (R. 342), that function being committed by Congress under the Railway Labor Act to the Adjustment Board. To the extent, however, that any existing agreements should, upon proper interpretation or application, prove to be a barrier to the realization in the fullest measure of the economies contemplated by its order, the Commission reserved ruling on North Western's request to abandon entirely the agencies in the program. Meanwhile, North Western continued under the duty of obeying the Commission's command to place the Plan into effect.

The petition with the Iowa Commission was filed January 24, 1958. Hearings were held beginning March 18, 1958 and ending June 6, 1958; and in these hearings also the ORT appeared as a protestant. On August 11, 1958, the Commission authorized the Plan to be put into effect immediately (R. 216-46). The Iowa Commission noted the evidence before it to be (R. 227) that "(T)he present average station work load per work day is 1' 14" which is a decrease of 28% from 1951 and the estimated average work load under (the) proposed program would be 3' 15"." It went on to say (R. 231):

"* * * In common with all other public enterprises operating under a profit system the applicant is compelled, by economic necessity, to curtail inefficient operation. In addition thereto, as a railroad carrier operating in interstate commerce, it is obligated to effect all possible economies, even though it remains subject to state authority with respect to a matter such as the one here under consideration."

tion or interpretation of an existing contract would appear to present a "minor dispute" under the Railway Labor Act. Although the Plan was placed in effect in South Dakota and Iowa in May and August of 1958, respectively, no grievances or claims for lost pay based upon the ORT's construction of the existing contracts were submitted to North Western until after the District Court's judgment had been entered.

In its formal findings the Commission further recognized the national, as well as the local, interest in the program in these terms (R. 235-6):

*** * * The problem of granting some relief has been before the National Congress. Savings must be made by reducing or eliminating service no longer needed. The case before us is a proposal to reduce agency service to the level of actual need. It is not one of complete discontinuance. It is the intent, according to evidence, to use the resultant savings for betterments and improvements such as the upgrading of branch lines, purchase of new cars, repair of cars so that they can be furnished to the shipper in better condition for loading and to otherwise better equip the railroad plant so as to insure efficiency, economy and adequate rail transportation."

Following the issuance of the South Dakota and Iowa orders, North Western placed them in effect promptly, recognizing fully its contractual obligations as to notice (R. 93). Service has since been furnished without difficulty by North Western and to the apparent satisfaction of the public (R. 214, 235).

Petitions for authority to effectuate the Central Agency Plan were filed in Minnesota on January 24, 1958, and in Wisconsin on April 14, 1958 (R. 90-91). Full hearings were held by both commissions in which the ORT appeared as a protestant. This Court may take judicial notice of orders subsequently entered by these commissions approving the Plan (Minnesota—Docket A-7559—November 12, 1958; Wisconsin—Docket 2-R-3380—January 20, 1959).

(d) **The ORT's Response to the Central Agency Plan.**

As indicated above, one of the forms of response by the ORT to the Central Agency Plan was to intervene as a protestant in all of the state commission proceedings, to present evidence in opposition, to cross-examine the North

Western's witnesses on the merits of the Plan, to file briefs and to participate in final oral arguments. With the entry of commission decisions uniformly adverse to its position, the ORT has sought to upset those decisions; and to prevent the Plan from being put into effect, under the judicial procedures available in each state, thus far without success.¹

The most significant response of the ORT to the Plan, however, was of an entirely different character. On December 23, 1957, six weeks after the filing of the first petition in South Dakota, ORT sent North Western a letter under Section 6 of the Railway Labor Act requesting that the existing collective bargaining agreement between the parties be amended by adding the following provision (R. 32):

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the Organization."

North Western, through Mr. T. M. Van Patten, its Director of Personnel, informed ORT that it did not consider this proposal for a change in the contracts to be legally within the scope of Section 6 of the Railway Labor Act, although he signified his readiness to confer (R. 33-34). Conferences were held, but ORT later invoked mediation under the Railway Labor Act and, on February 24, 1958,

1. Mr. Schoene, the ORT's counsel who represented it in all of the proceedings before the state commissions, in a public speech reprinted in the May, 1959 issue of the ORT's magazine, complained that he had found the commissions "very amenable to the railroads' suggestions;" and he went on to say: "I cannot believe that the commissions in Iowa, South Dakota, Wisconsin, and Minnesota, in authorizing the wholesale station abandonments that they have authorized, not only on the Chicago Northwestern, but also on the Rock Island, on the M&StL, on the Minnesota Western, were *honestly* and *objectively* weighing the public interests." This confirms the general attitude the ORT has taken towards regulation in respect of the Central Agency Plan: If the state commissions reject our version of the public convenience and necessity, we will still make it prevail by other means!

the National Mediation Board began mediating the matter (R. 43-44). After various meetings with the parties, the Board closed its files on June 16, 1958 (R. 51). The Board had asked the parties to arbitrate on May 27, 1958, but ORT declined on May 28, 1958 and subsequently North Western declined on June 12, 1958 (R. 49-50).

On July 10, 1958, ORT circulated to all its members a letter and Strike Ballot concerning the dispute (R. 53-59). That letter stated in part (R. 54, 57) :

"Last fall a program of this sort that is of vital concern to our members was initiated by this management. This program is directed at the elimination of the vast majority of agents serving one-man stations. Proceedings were begun before the Public Service Commissions of South Dakota, Minnesota, Iowa and Wisconsin seeking authority either to close nearly all the one-man stations or to have one agent serve two, three or four stations. Similar proceedings in other states may be expected momentarily.

"In the public interest, as well as in the interest of our members and the organization as a whole, we have done everything possible to resist this program. Through reliance on the provisions of our Agreements, through informing the residents of the affected communities as to the consequences of the railroad's actions and through attendance at all the hearings of the various commissions and the presentation of evidence and argument, we have tried to make reason, common sense and humanity prevail. Since last November practically all of the time of your General Chairmen and four Vice Presidents as well as much of the time of a number of our Local Chairmen and our General Counsel and of our President has been devoted to these efforts.

*"However, it became evident at an early date that to meet this onslaught effectively would require strengthening of our Agreements. * * * We must prevent a continuance of such a program."*

"While we hope the commissions in other states

will be more reasonable than the South Dakota Commission, we have no assurance that we will not soon see a repetition in other states of what has happened in South Dakota * * *

On August 11, 1958, the Iowa Commission issued its order putting into effect the Central Agency Plan (R. 216-246). One week later, on August 18, 1958, ORT issued a Strike Call to its members for 6 A.M. on August 21, 1958 (R. 60-67). The Strike Call, under a heading of "The Issues," referred to the Strike Ballot circular of July 10 and further stated (R. 60-61):

"In the circular we summarized the circumstances giving rise to the urgent need for such a rule. We pointed out the general onslaught of this Carrier on the employment of the people we represent, and particularly the system-wide, wholesale elimination of agency positions and enlargement of assignments of the remaining agents. We recited the brutal conduct of the Carrier in South Dakota in abolishing 53 positions and enlarging the assignments of 16 others, all in one day, before we even had notice of the Order of the South Dakota Commission under which the Carrier purported to act.* We also told you of our strenuous, patient, but futile efforts to correct the situation under the Railway Labor Act and in the Courts.

"The need for the proposed rule has again been tragically demonstrated in the last few days. What happened in South Dakota was repeated in Iowa, except that this time 70 positions were abolished and 27 assignments enlarged.

"The vote on the strike ballot was almost unanimous in favor of a strike. The time has come to act in accordance with that vote."

North Western was not informed of the threatened strike until August 14, 1958, when it received notice of the strike from the National Mediation Board (R. 94). The Board

* North Western fully observed the termination notice provisions of the ORT agreements (R. 93).

proffered its mediation services in the dispute and this was accepted by both parties, with the case being docketed as E175 (R. 98-99).

The mediator, Wallace Rupp, came to North Western on August 19 at 2:30 P. M. and discussed the matter with Mr. Van Patten (R. 98, 157-158). Mr. Rupp asked Mr. Van Patten if there was any field he knew which might form a basis for settlement of the dispute. Mr. Van Patten said that, without prejudice to his position regarding the illegality of the demand, he thought there was a possibility of settling the entire question involving the proposed rule on the railroad by working out an arrangement for limiting the number of layoffs per year to an agreed percentage of the total number of jobs of the ORT, over and above the reduction in the number of such employees by attrition (R. 157-158, 111).

Mr. Rupp thought for a minute and said, "You have planted a seed and given me something to talk to the Organization about." Mr. Van Patten cautioned Mr. Rupp that he was not making a formal proposal, although he did give him every reason to believe that he was willing to undertake negotiations along that line. Mr. Rupp stated that it was certainly not the time for formal offers to be made by either party, but it gave him a thought and something to talk to the ORT representatives about. Mr. Rupp said he was going to talk to them immediately at the Congress Hotel, and if they were interested he would call Mr. Van Patten the following morning. He did not call (R. 158).¹

1. Mr. Leighty confirmed that Mr. Rupp did come immediately to the hotel (R. 143). Mr. Leighty's testimony was that "there was considerable discussion," and that "I cannot recall everything that was said." He did testify flatly that Mr. Rupp had said that North Western had nothing to offer (R. 143). His testimony as to whether the mediator had any suggestions was couched in terms of "I do not recollect" and "I do not remember," although he finally said he thought he would have remembered any such suggestion if made (R. 143-44).

On August 20, 1958, the National Mediation Board closed its file in Docket E175, stating that it continued to stand ready to make its services available in case either party desired further mediation efforts (R. 68). The ORT did not reply to this wire but North Western wired back that it was ready to cooperate with the Board at all times (R. 99).

(e) **Effect of Proposed Contract.**

Mr. Leighty testified that the requested contractual provision would mean that North Western could not abolish the position of an agent at a one-man station agency without the permission of the union (R. 147). By custom and practice in the railroad industry, contracts are perpetual and can be changed only by mutual consent (R. 159).

The experience of North Western with ORT, under contracts less rigorous than the one proposed, has been such that it could not safely assume that ORT would agree to the abolition of agency positions (R. 163-164). North Western could not make certain modernization improvements in the future and could not have made them in the past under a contract provision of the kind proposed by ORT (R. 161), which provision is available to all other crafts if it is proper for the ORT. These include its completed or continuing programs in the form of the dieselization of all operations; the consolidation of 14 scattered and obsolete repair facilities into one new modern shop at Clinton, Iowa; improvement of highway grade crossing protection; and the mechanization of maintenance of way procedures. It would block its plans for the future in respect of such matters as electronic yard operations and the installation of centralized traffic control. These necessary modernization programs can be accomplished only through the generation of additional capital by company

savings, and contracts of the kind proposed by ORT would preclude any such savings for all time (R. 161).

North Western cannot accept the contract for which ORT is contending and carry out the orders of the South Dakota and Iowa Commissions, or line abandonment orders of the Interstate Commerce Commission (R. 118-9).

2. North Western's Efforts to Bargain With ORT.

There appears above an account of North Western's efforts, in the course of the emergency mediation, to initiate discussions of a plan for reducing the number of agency positions in accordance with a fixed annual percentage, including an attrition factor, and of the failure of that effort. This was not the first time, however, that North Western had signified a readiness to confer with the ORT for the purpose of trying to effectuate the Central Agency Plan by agreement. On May 26, 1958—approximately two weeks after the South Dakota Commission had issued its order and while the first mediation was still in progress—Mr. Heineman, Chairman and Chief Executive Officer of the North Western, asked Mr. Leighty to meet with him during a recess of one of the hearings at Madison, Wisconsin (R. 76-77, 135-6). Mr. Heineman said, "George, do you think there is any possibility of our sitting down and working out these station closing matters and the discontinuance of these station agents either on a South Dakota or a system basis?" Mr. Leighty turned to Mr. Schoene, his general counsel, and said, "Well, what do you think, Lester?" Mr. Schoene said, "I think we are too far apart." Mr. Heineman then said, "Well, that is up to you gentlemen, but I want you to know that my door is always open." No response was made by the ORT to this invitation (R. 77). Indeed, Mr. Leighty did not even tell his representative in the then current mediation proceedings, Mr. Kinkead, about this incident (R. 154).

Mr. Heineman testified without challenge that his purpose in making this approach was to indicate a willingness to discuss with the ORT some means of cushioning the economic impact of abolition of positions, it being his opinion that the railroad has always had a responsibility in that regard, and that the approach itself was "an offer to bargain on the realities underlying the (ORT's) proposal, and was designed "to draw out further negotiations" (R. 105-6).

Not long after the new management took control of the North Western, and as an adjunct to the steps it was taking to reduce costs through reorganization and modernization programs, it proposed severance pay protection over and above that provided by the Railroad Unemployment Insurance Act (R. 102-3). On December 27, 1956 it entered into the first Supplemental Unemployment Benefits Agreement in railroad history with substantially all of the non-operating unions other than the ORT (R. 303-312). The ORT, although offered participation in this Agreement, chose not to do so at the time it first became effective (R. 103). It was again offered the ORT in the fall of 1957 (R. 103-4); and during the controversy over the threatened strike North Western made it clear that it would extend the identical terms of the Agreement to the ORT on a retroactive basis to the same date set out in the ORT's demand (R. 104).

The ORT did not choose to accept that offer or even to discuss it. Mr. Leighty testified that he knew the dispute could be settled by his acceptance of the SUB Agreement on this or some comparable basis (R. 147-48). Although he stated his opinion to be that the Agreement was inadequate, he neither made any proposals for alterations of its terms nor indicated any interest in discussing the matter. The ORT's response to all of these efforts on the part of

North Western to interest it in some provision for cushioning the impact of unemployment or of reducing the rate at which unemployment would result from the Central Agency Plan has been simply to insist upon its proposed veto power over discontinuance of any positions (R. 148).

The last sentence of the District Court's Finding No. 17 (R. 357) is: "Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads." North Western challenges this as unsupported by the record.¹ The ORT tried to supply such evidence, but the results of this effort were (1) the inclusion in the record of two agreements between the Railroad Yardmasters, on the one hand, and Chicago Great Western Railway Company and Missouri-Kansas-Texas Lines, respectively, on the other (R. 346-9); and (2) testimony by Mr. Leighty as to a shop crafts agreement of the Seaboard Air Line (R. 138). The first two such agreements are identical in terms, and show on their faces that the employment maintenance provisions were to last less than two years. Although the Seaboard agreement was not offered in evidence so that its complete terms could be examined, Mr. Leighty's own testimony showed that it guaranteed an agreed level of employment only from year to year. None of these agreements involved a veto power in perpetuity over the discontinuance of positions, or were directed against the effectuation of regulatory orders.

The ORT has sought to repair these deficiencies in the record by a 60-page appendix to its brief referring for the first time to a mass of material not of record. Extraordinary as this is in terms of the orderly resolution of a lawsuit, it is significant that not even by this means has

1. This is the only one of the District Court's true findings of fact, as distinguished from conclusions which were intruded under this heading, which North Western finds it necessary to attack.

the ORT come up with a clear showing of a contract provision in any industry identical in scope with the ORT's demand in this case. The District Court's finding, even with massive assistance from outside the record, is still without foundation.

A large part of the ORT's lengthy excursion beyond the courtroom—free of the dusty baggage of cross-examination, authentication, and similar inconveniences encrusted upon the judicial process—is devoted to the merits of severance pay and supplemental unemployment benefit plans, and the elements of strength they contribute to the process of private collective bargaining.¹ What appears of record with respect to North Western's SUB Agreement and its efforts to interest the ORT in this or some other severance pay arrangement, demonstrates North Western's adherence to these views. But what of the ORT? The record shows that it did not choose to bargain about these matters with North Western; and the official proceedings of Congress reveal that, in the ORT's view, they are not

1. The table in the Appendix (pp. 57-63) is a good illustration of the vices of going outside the record. It is captioned "Instances Where a Carrier Asserted That Subject of Employees' Notice was not Bargainable Under the Railway Labor Act." The limited survey which has proved possible indicates an erroneous characterization in many instances. Thus, far from involving uniform and exclusive assertions by the carrier of non-bargainability as to "rates of pay, rules, and working conditions", many of the so-called notices involve these entirely separate issues, in some cases raised by the unions: (1) the propriety of the notice under existing moratorium provisions, (2) the relationship to Section 6 of cancellation clauses contained in existing agreements, (3) minor disputes involving the general issue of changes effected without prior Section 6 notice, or (4) the proper organization to submit a particular demand. In certain other instances no issue of bargainability of any kind was raised, while in other situations where the issue of bargainability was reserved, a settlement was nevertheless reached. Thus, these items have not only been improperly injected into these proceedings for the first time before this Court, but they offer no support for the ORT's suggestion that the issue of bargainability under the Railway Labor Act will inevitably arise to impose an undue burden on the federal courts.

desirable subjects for bargaining with any railroad employer.

Mr. Schoene was a witness in support of Senate Bill 226, 86th Congress, 1st Session, proposing increases in the benefits provided by Railroad Retirement and Unemployment Compensation. During his appearance on February 10, 1959 before a subcommittee of the Senate Committee on Labor and Public Welfare, this colloquy took place between himself and Senator Clark, of Pennsylvania:

"Senator Clark. I assume that your reason for asking this direct legislative increase in the unemployment compensation payments for railroad employees is because you feel you would not be successful in collective bargaining and have not been successful in collective bargaining in the past with the railroads as the steelworkers and auto-workers union have been with their respective industries, because of the present financial difficulties in which the railroads find themselves.

"Is that correct?

"Mr. Schoene. No; I do not think that that is quite correct, Senator Clark. We have not tried to bargain with the railroads on the subject of supplemental unemployment insurance.

"Senator Clark. Then why do you want to take a different tack from the auto-workers and the steelworkers?

"Mr. Schoene. It is our view that unemployment insurance should be dealt with in its entirety by legislation. I think that the auto-workers and the steelworkers were driven to supplementation by collective bargaining because they could not get legislative action in the States sufficiently, generally in the States, to take care of their needs.

"My own personal feeling is that it would be preferable generally to take care of unemployment insurance by legislation. We feel that having a nationwide system for the railroad industry alone, we can properly make our recommendations to Congress on that sub-

ject, rather than to have a structure which consists partly of legislation and partly of supplementation through collective bargaining."

In other words, never bargain with a private employer if you can bargain with Congress. When the District Court found as a fact from the evidence of record, as it did (Finding No. 20, R. 357), that "(North Western) did show willingness to negotiate upon the central agency plan, including a possibility concerning severance pay," it could not have known how completely uninterested the ORT was in such a negotiation.

Mr. Leighty summed it all up when, after the District Judge had intervened in the questioning to get a clear answer as to whether the ORT had ever evinced any sign of being willing to discuss a modification of its demand, he stated on the record that "** * * the only alternative which up to the present I have offered the North Western Railroad was to comply with this rule or strike.*" (R. 148.)

3. Submission to National Railroad Adjustment Board.

Nowhere in the ORT's statement is there any reference to the facts which provide an independent basis for the injunctive relief directed by the Court of Appeals. On August 21, 1958 North Western formally advised the ORT that its proposed contract demand was barred by the moratorium provisions of the National Agreement of November 1, 1956 (R. 100) and the following day North Western submitted this issue to the National Railroad Adjustment Board (R. 247-300).

Article VI of the National Agreement provided that during its life (to October 31, 1959) the parties would not serve any contract demand for various purposes, including the establishment of compensation for time paid for but not worked (R. 268-9). Although there was a general exception

for proposals relating to "stabilization of employment," Special Board of Adjustment No. 215 had found that proposals for payments for time not worked do not fall within the meaning of this exception (R. 287ff.). The National Mediation Board has consistently held that disputes involving the interpretation or application of executed mediation agreements are to be resolved by the National Railroad Adjustment Board (R. 162-163). North Western accordingly submitted this dispute, as a matter involving the interpretation or application of an existing agreement, to the latter agency on August 22, 1958, where the matter is pending for decision.

QUESTIONS PRESENTED.

1. Did Congress intend that the interruption of interstate commerce incident to a railroad strike can be founded upon a contract demand that no position in being on a date antecedent to the demand be discontinued without the union's consent, where the purpose and effect of such demand is to prohibit the carrier's compliance with state commission orders in a sector of interstate commerce left by Congress to state regulation in the interest of economical and efficient transportation service to the public?
2. May a labor organization lawfully strike to enforce a demand, the propriety of which under the moratorium clause of an existing labor agreement presents a substantial question as to the application or interpretation of that agreement, thereby involving a "minor dispute" which has itself been duly submitted to, and is pending before, the National Railroad Adjustment Board?

SUMMARY OF ARGUMENT.

The Norris-LaGuardia Act does not automatically dispose of the propriety of injunctive relief in this case. That Act is one expression of Congressional policy. Where the facts of a particular case bring other Congressional policies into play, it is the function of this Court to determine which of such policies Congress intended to be dominant, and to accommodate these policies so as to give effect to that intention. In making such accommodations this Court has not considered itself bound at all events to accord Norris-LaGuardia the position of primacy.

Congress has affirmatively declared the national interest in economical and efficient rail transportation in interstate commerce. It has given concrete expression to that interest not only by providing in the Railway Labor Act a framework for the conduct of labor relations so as to minimize strikes, but also by consciously shaping the Interstate Commerce Act so as to vest certain regulatory powers in the Interstate Commerce Commission and to leave for the time being the regulation of certain other aspects of interstate commerce to the states. This last in itself is an expression of Congressional policy. In the case of station agencies, the legislative record shows this policy to have been arrived at with full appreciation of the important effects upon the national interest, but with a deliberate decision to leave this regulatory job to the states because it is being adequately, and in Congress' judgment most suitably, performed at the local level.

The record in this case shows a calculated purpose in the ORT to use the processes of the Railway Labor Act to frustrate the regulatory decisions of four states with respect to the Central Agency Plan. The impact of this effort is, thus, upon Congressional, as well as state, policy.

Congress did not intend that the national interest in the economic, efficient and uninterrupted flow of interstate commerce should be subverted by a strike founded upon a contract demand having the purpose and the effect of the one advanced by the ORT in the factual setting of this record. The relevant federal policies are to be accommodated accordingly.

To do so does not imperil legitimate collective bargaining in the railroad industry; or expose the federal courts to the dangers of being indiscriminately called upon to sit in judgment upon all contract demands; or take us back to pre-Norris-LaGuardia abuses. A judgment of affirmance would mean—and only mean—that the demand served by the ORT on the North Western on December 23, 1957, cannot provide the basis of a strike aimed at preventing North Western from complying with the regulatory orders of four public agencies exercising powers over interstate commerce left to them by Congress in aid of a national policy.

The record shows no refusal by North Western to confer or bargain about the Central Agency Plan. It shows rather, and the District Court found as a fact, repeated and serious efforts to do so, uniformly rejected by the ORT. North Western's only refusal was to recognize or participate in an exercise of bargaining power beyond the contemplation of Congress because it was inimical to Congressional policy. Had it not so refused, this record shows that the fate of the Central Agency Plan would have depended upon North Western's ability to survive a strike; and not upon the merits of the Plan as found by four state commissions. Congress did not intend to substitute economic warfare for regulation in this area of interstate commerce—to submit issues of this kind for determination by ordeal of battle rather than by the public authority provided for this purpose.

The injunctive relief directed by the Court of Appeals is proper by reference to an independent ground asserted by North Western. These parties had by contract imposed limitations upon themselves with respect to the making of certain kinds of demands during the period from November 1, 1956 to October 31, 1959. North Western claimed that the demand in issue fell within this ban. That presented a question as to the interpretation or application of an existing agreement; and North Western submitted that issue to the National Railroad Adjustment Board, where it is pending for decision. Under the Railway Labor Act as heretofore construed by this Court, North Western was entitled to an injunction against a strike founded upon that demand.

The District Court had jurisdiction to resolve North Western's claim, founded as it was upon rights assertedly accruing to it under federal statutes relating to interstate commerce. Whatever the merits of that claim may ultimately be found to be, it was no insubstantial or frivolous claim of federal rights; and there was jurisdiction, without reference to diversity, to hear and determine it.

The District Court's orders granting injunctive relief are moot in the present posture of this case. The questions raised about them were not "decided" by the Court of Appeals, within the meaning of Rule 19 of this Court relating to its certiorari jurisdiction. In any event, those orders were proper. In granting a permanent injunction on the merits to September 19, 1958, the District Court correctly construed the waiting period requirements of the Railway Labor Act; and, in entering an injunction pending appeal, the District Court properly exercised a discretion explicitly vested in it by Rule 62(c) of the Federal Rules of Civil Procedure.

ARGUMENT.

I.

A CONFLICT BETWEEN THE NORRIS-LA GUARDIA ACT AND OTHER FEDERAL STATUTES REQUIRES A JUDICIAL ACCOMMODATION.

In ascribing an unyielding primacy to the Norris-LaGuardia Act, both the ORT and the RLEA obscure the direct conflict between the private power sought by the ORT and the effective operation of public regulatory authority. The effort by the ORT to subject public regulation to a private veto cannot be meaningfully considered without reference to basic economic policies reflected in the Congressionally formulated pattern of federal-state railroad regulation. This need for accommodating Norris-LaGuardia to other aspects of Congressional policy is not presented here as a matter of first impression. It is a subject to which both labor and management have hitherto been introduced by this Court.

In its initial effort to reconcile the statutory purposes of the Railway Labor Act with the literal terms of Norris-LaGuardia (in that case over the objections of a reluctant management), this Court held that the provisions of Norris-LaGuardia were applicable only insofar as they created no conflict with the dominant requirements of another statute. *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 563 (1937).

Twenty years later it was a labor organization which claimed that Norris-LaGuardia provided a bar against the grant of federal injunctive relief "to vindicate the processes of the Railway Labor Act." *Brotherhood of Rail-*

road Trainmen v. Chicago River & Indiana Railroad Co., 353 U. S. 30 (1957). That case, arising from those provisions of the Railway Labor Act relating to minor disputes, is of general significance to the problem of reconciling the literal anti-injunction provisions of Norris-LaGuardia with the statutory scheme and purposes of the Railway Labor Act. In withdrawing the *Chicago River* strike from the limitations of Norris-LaGuardia, the Court observed (353 U. S. at p. 40):

"We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

The Norris-LaGuardia Act does not provide a unique example of the need for adjusting legal instrumentalities fashioned for the protection of legitimate labor activity to other aspects of public policy. In *Thornhill v. Alabama*, 310 U. S. 88 (1940), this Court extended the broad protection of the Fourteenth Amendment (construed as embodying the free speech guarantee of the First) against a state statute which sought to declare peaceful picketing illegal.

The doctrine of *Thornhill* was propounded under circumstances in which the picketing had not been shown to be a coercive device directed towards the negation or frustration of other formulations of public policy. Its qualification began with *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949), in which the protection of the Federal Constitution from the injunctive powers of a state court was held not to extend to peaceful picketing avowedly directed to coercing conduct in violation of a

state anti-trade-restraint statute.¹ The Court said (336 U. S. at pp. 497-8, 503):

"It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgement of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill v. Alabama*, 310 U. S. 88, 102, and *Allen Bradley Co. v. Union*, 325 U. S. 797, 807, note 12. But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to non-union peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law."

"And it is clear that appellants were doing more than exercising a right of free speech or press. *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 776-777. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade."

Giboney involved economic coercion directed against compliance with the public policy of the state embodied in

1. For a more detailed analysis of the *Thornhill* case and its subsequent accommodations to other aspects of public policy, see *Gregory, Labor and the Law* (2nd Rev. Ed., 1958), Chap. XI, which deals with the cases discussed here. The history of *Thornhill* is set forth in this brief as illustrative of a process of judicial accommodation, and not because its references to state policy are asserted to be controlling on the issues of Congressional intent presented by this case.

a specific statute. In *Building Service Employees, Local 262 v. Gazzam*, 339 U. S. 532 (1950), a further qualification was made with reference to a general legislative declaration of public policy, as construed by the state's highest court, against the use of coercion by employers (involuntary in this case) in the designation of collective bargaining representatives by employees; and in *Hughes v. Superior Court*, 339 U. S. 460 (1950), this Court held it to be immaterial that the public policy against which the picketing was directed had been declared by state courts rather than by legislative enactment. As in *Giboney*, the activity which the picketing sought to coerce in *Gazzam* and *Hughes* would have constituted an illegal violation of public policy and the rights of third persons which that policy sought to protect. *International Brotherhood of Teamsters, Local 309 v. Hanke*, 339 U. S. 470 (1950), dealt with the related, but distinct, problem of picketing intended to coerce activity which, while not constituting an illegal violation of the rights of any third persons, was contrary to a state policy in furtherance of the general public interest thought to exist in self-employment.

The judicial accommodation of the *Thornhill* doctrine to competing considerations of public policy is not unlike the reconciliation which this Court has sought to effect between the policies of Norris-LaGuardia and of co-ordinate Congressional enactments. Thus, in dealing with the diverse purposes of the Norris-LaGuardia, Sherman and Clayton Acts, this Court, in a manner reminiscent of its pronouncements in the constitutional area of *Thornhill*, expressed itself in the following terms in *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797 (1945) (at p. 806):

"The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a

competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other."

This process of reconciliation inevitably involves more than a simple comparison of the literal provisions of the conflicting statutes. "In short, there is no rule of thumb for accommodating conflicting statutes. The plain language of the Norris-LaGuardia Act is generally violated if a labor injunction is issued, whereas, if it is withheld, the other statute is not usually literally violated, although its purpose may be defeated." Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958). But the absence of a rule of thumb has not proved an insurmountable barrier to the accommodation of the literal provisions of Norris-LaGuardia to Congressional purposes embodied in the Railway Labor Act and other federal statutes concerned with interstate commerce in rail transportation.

II.

WHERE THE AIMS OF ECONOMIC COERCION ARE CONTRARY TO OTHER POLICIES INTENDED BY CONGRESS TO BE DOMINANT, NORRIS-LA GUARDIA IS INAPPLICABLE.

This Court has considered the efforts of certain railway labor organizations to seek in Norris-LaGuardia a sanctuary from injunctive interference for racially discriminatory practices. These acts of discrimination violated no specific provisions of the Railway Labor Act. Thus, the determination of Congressional intent as the basis for an appropriate accommodation was derived from implied purposes rather than from express mandates.

In *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), without reference to any express duties imposed on bargaining agents by the terms of the Railway Labor Act, the Court said (at p. 199) :

"But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of the craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."

The Court further stated (at pp. 202-203) :

"We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

Similarly, in *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944), the Court, notwithstanding the absence of any express statutory requirements or limitations, said (at p. 213) :

"We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct."

The *Steele* and *Tunstall* cases did not raise the precise issue of possible limitations imposed by Norris-LaGuardia on the capacity of the federal courts to effectuate by injunction Congressional intent inferred from the policies and purposes of the Railway Labor Act. That issue was squarely raised for the first time in *Graham v. Brother-*

hood of Locomotive Firemen & Enginemen, 338 U. S. 232 (1949).

In an effort to remove the *Graham* case from the lengthening shadow of *Virginian Railway*, the labor organization suggested that, while the earlier case involved no labor dispute within the meaning of Norris-LaGuardia, the existence of such labor dispute in *Graham* provided immunity against federal injunctive relief. This Court rejected any idea that *Virginian Railway* was predicated on the absence of a labor dispute within the meaning of Norris-LaGuardia (338 U. S. at pp. 237-8). Notwithstanding its belief that a labor dispute was at the core of the *Graham* case, this Court, in holding Norris-LaGuardia inapplicable, observed (338 U. S. at p. 240):

"* * * there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If, in spite of the *Virginian*, *Steele* and *Tunstall* cases, *supra*, there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now. * * *."

Steele, *Tunstall* and *Graham* involved the accommodation of (1) the implied statutory duty of a bargaining agent under the Railway Labor Act to represent without unfair discrimination all members of the class for which it acted, and (2) the literal provisions of Norris-LaGuardia. In *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952), this Court significantly expanded the scope of the policy considerations by which the validity of collective bargaining demands under the Railway Labor Act must be judged. In considering a new problem of a discriminatory labor agreement entered into by the railroad at the demand of a union which was not the bargaining agent of the

Negro workers, the Court found in the policy underlying the Railway Labor Act a prohibition under any circumstances of the use by bargaining agents of "their position and power to destroy colored workers' jobs in order to bestow them on white workers."

The *Howard* case has apparently been misread by the RLEA. Lumping it with *Graham*, *Steele* and *Tunstall*, the RLEA states in its brief (p. 30):

"The cited cases did not limit the subject-matter of collective bargaining under the Railway Labor Act. Instead, they hold in substance that, whatever the subject-matter of the bargaining may be, the duly certified representatives of the employees must use its bargaining authority so as not to improperly discriminate against parts of the craft or class represented. The particular discrimination involved in the cited cases related to race. The cases obviously have nothing to do with the question of whether the Railway Labor Act limits the subject-matter of collective bargaining."

Contrarily, the *Howard* case, which did not involve discrimination "against parts of the class or craft represented," clearly establishes racial discrimination generally as an improper subject matter of collective bargaining; and it establishes the principle, wholly apart from the obligations of the duly constituted bargaining agent to the members of the class it represents, that there are certain demands which this Court can find to be wholly outside the range of Congressional authorization.¹ No less does it

1. In addition to grouping *Howard* improperly with the other cases, the ORT and the RLEA try to turn them all aside by vague references to the inherent immorality, and consequent "illegality," of racial discrimination. In *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955), cert. den. 350 U. S. 967, a white employee sought an injunction against bargaining by his union and the railroad about a contract proposal affecting his seniority rights. There being no diversity, the district court dismissed the complaint as presenting no federal ques-

establish that in appropriate circumstances the literal provisions of Norris-LaGuardia do not operate to bar the federal courts from enjoining strikes founded upon the misuse of collective bargaining rights under the Railway Labor Act.

The thrust of these precedents cannot be ignored, and, indeed, the ORT recognizes that the process of accommodation has rendered Norris-LaGuardia inapplicable "in three situations involving railway labor." ORT initially characterizes these situations as relating to (1) minor disputes, (2) illegal activities, and (3) compliance with the positive mandates of the Railway Labor Act (ORT Brief, pp. 21-22). With further precision the ORT also appears to recognize that the existence of "illegality" has been held to derive, not from collective bargaining agreements which violate express statutory requirements, but rather from agreements "inconsistent with the *policy* of the Railway Labor Act" (ORT Brief, p. 25). Nevertheless, both the ORT and the RLEA seek to avoid the necessity for dealing with the policy considerations invoked by the demand in these proceedings by their basic contention that the existence of a "labor dispute" within the meaning of Norris-LaGuardia obviates the need for any such inquiry (ORT Brief, pp. 19-44; RLEA Brief, pp. 45-52).

In achieving an appropriate accommodation between Norris-LaGuardia and other aspects of public policy, the Courts of Appeals and this Court have perhaps differed in their terminology, although not in result. In the opinion below, the Court of Appeals, in apparent reliance on *Brotherhood of Railroad Trainmen v. New York Central*

tion. The Sixth Circuit reversed, noting that, although no racial discrimination was involved, the dispute, as in *Howard*, raised the issue of the validity under the Railway Labor Act of a proposed contract, and that the employees were, as this Court there held, entitled to "look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the (Railway Labor) Act."

Railroad Co., 246 F. 2d 114 (6th Cir. 1957), cert. den. 355 U. S. 877 (1958), expressed its view that the present proceedings did not involve a labor dispute.

The *New York Central* case involved a protest strike directed against the closing of a railroad yard—an act which engendered no major dispute because no changes in the provisions of existing contracts were involved, and no minor dispute because of the absence of any suggestion that the action was in violation of existing agreements.¹ In holding Norris-LaGuardia inapplicable to the circumstances before it, the Sixth Circuit said (246 F. 2d at p. 122):

“In this case, in our view, no labor dispute exists. A strike would interfere with appellee as a common carrier of interstate commerce, in the discharge of its duties which are imposed by federal law. The district court had jurisdiction over the subject-matter of the suit. A railroad strike involving a controversy which does not constitute a labor dispute, may be, and properly is, enjoined upon a showing that it will interfere with interstate commerce and result in irreparable injury to the public and to the railroad.”

This Court, in its treatment of collective bargaining agreements contrary to the policies of the Railway Labor Act, has not deemed it necessary to sustain the injunctive powers of the federal courts on the basis of an absence of a “labor dispute” within the meaning of Norris-LaGuardia. Where “the activity enjoined was outlawed by federal law and policy” (ORT Brief, pp. 24-5), Norris-

1. The RLEA has also misread the *New York Central* case on the question of the presence of a minor dispute bringing it within the doctrine of *Chicago River* (RLEA Brief, pp. 51-2). RLEA asserts that the railroad brotherhoods “were contending that the proposed action of the carrier in closing the yards violated existing contracts.” With reference to the protest strike before it, the *New York Central* court stated (246 F. 2d at p. 118): “Here we are confronted by neither a major nor a minor dispute, within the meaning of the Railway Labor Act, * * *.”

LaGuardia has been held inapplicable, and the question of the presence of a "labor dispute" within the meaning of Norris-LaGuardia has been rendered irrelevant. *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 237-8 (1949).

The ORT correctly observes that the present case was tried on the theory that Norris-LaGuardia is inapplicable to the strike against which relief was sought (ORT Brief, p. 46).¹ To this it might be added that the inapplicability of Norris-LaGuardia is predicated on the unlawfulness of the ORT's demand which subverts the operation of public regulatory authority and which is therefore contrary to Congressional purposes and policies. With reference to this crucial issue, the essence of the holding below is that the effort to subject the implementation of public regulatory orders to a private veto is outside the scope of Congressional authorization, and a strike to enforce this objective is, accordingly, enjoinable.

The suggestion by the court below of the absence of a "labor dispute," while consistent in language with the treatment of this issue in *New York Central*, is not an essential element of its holding concerning the impropriety of the demand. That comment, however, has been used to divert attention from the actual genesis and aim of the ORT's demand in this case. In place of such discussion, there has been substituted an extended commentary by both the ORT and the RLEA regarding the presence of a "labor dispute" in these proceedings, even if the impropriety of the demand be assumed. Given a purpose and effect contrary to the procedures or policies of the Railway Labor Act, this point is no more dispositive of the

1. If Norris-LaGuardia is inapplicable because of the impropriety of the ORT's demand, the ORT's arguments based upon Sections 7 and 8 of that Act are irrelevant. In any event, the good faith bargaining efforts contemplated by Section 8 have been more than met by North Western on this record.

ultimate issue in this case than it proved to be in *Virginian Railway, Steele, Tunstall, Graham, Howard and Chicago River.*

III.

THE ORT'S DEMAND HAS THE PURPOSE AND EFFECT OF CREATING A PRIVATE VETO POWER OVER PUBLIC REGULATORY AUTHORITY.

The ORT displays an understandable sensitivity to the characterization of its demand as calling for a "veto" power (ORT Brief, pp. 41-2), although the word "veto" is one which the RLEA does not find inapposite (RLEA Brief, p. 37). This characterization does not seem extravagant in the light of Mr. Leighty's testimony that its effect would be "that the railway could not abolish the position of an agent at a one-man station agency, without the agreement or permission of the union" (R. 147).

The avowed object for which this power is sought is the frustration of the regulatory orders of the four state commissions which have approved the Central Agency Plan. It was this displacement of public regulatory authority by private veto which the Court of Appeals found offensive to Congressional policy; and its concern on this score clearly emerges from its opinion. Thus, the court recites these facts (R. 378-9):

"North Western filed petitions for authority to effectuate the Central Agency Plan with the Public Utilities Commissions of South Dakota, Iowa, Minnesota and Wisconsin. In South Dakota, the Public Utilities Commission held hearings at various points throughout the State over a period of about two months. The Union appeared in the proceedings to protest the granting of the authority sought; presented evidence, participated in filing briefs with, and in oral argument before, the Commission. . . ."

"In the Commission proceedings, the Union took

the position that the Central Agency Plan could not be put into effect without agreement of the Union under the existing collective bargaining contracts. However, a few weeks after North Western filed its first petition in South Dakota, the Union sent North Western letters under Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 151, *et seq.*) requesting that the existing collective bargaining agreements be amended by adding the following provision:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the Carrier and the Organization."

The court also attached importance to the purpose, showing on the face of the ORT strike circular and call, of anticipating and rendering ineffective the regulatory orders (R. 380-1).

With reference to these unique facts as they had developed between this union and this railroad, the Court of Appeals made these additional statements leading inexorably to its ultimate holding (R. 382):

"Here the Union is demanding such veto power over the abolition of any position in existence on December 3, 1957. The Union is thus attempting to attain, through the collective bargaining processes of the Railway Labor Act, that which would prohibit North Western from complying with the orders of the South Dakota Public Utilities Commission and the Iowa State Commerce Commission.

* * * * *

"This contract proposal, if accepted, would enable the Union to control the pace of North Western's compliance with the Commission orders aforesaid. (R. 383.)

* * * * *

"A carrier may not escape its obligations by bargaining them away. The Commission orders may not be circumvented by a contract entered into by a carrier and a union under threat of strike." (R. 384.)

The court thereupon stated its conclusion in these terms (R. 385):

"We, therefore, hold that such a demand as here made by the Union is completely outside the ambit of 'rates of pay, rules and working conditions', as those words are used in the Railway Labor Act, *In re Chicago North Shore and M. R. Co.*, 7 Cir. 1945, 147 F. 2d 723, 727, cert. den. 325 U. S. 852, and hence is not within the scope of mandatory bargaining. Therefore, the terms of the Norris-LaGuardia Act are here inapplicable."

If there is to be read into the Railway Labor Act a Congressional purpose to permit its collective bargaining procedures to be used to acquire the power to prevent the effectuation of public regulatory orders, then it will be open to each labor organization to seek for itself the unique form of job security which such power confers. The ORT's demand does not seek to secure financial benefits for the employee who, through the operation of seniority, is displaced or otherwise affected by the discontinuance of a position. Indeed, North Western's efforts to negotiate such protections were spurned. The ORT's demand is for nothing less than permanent control over the position itself, however much the public interest may call for its elimination in the view of federal or state regulatory agencies.

This basic distinction may be obscured, but cannot be obliterated, in the abstract discussions by the ORT of "stabilization of employment" or "job security," and by the RLEA concerning "rates of pay, rules or working conditions" (ORT Brief, pp. 26-33), and ORT Appendix; RLEA Brief, pp. 33-45). Thus, in the case of a branch line abandonment authorized by the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act (49 U. S. C. Sec. 1(18)), the ORT seeks power to compel the maintenance of each station agency position notwithstanding the authorized abandonment. But a branch

line abandonment may affect other organizations to no less degree. If the ORT is successful here, may not the effort to acquire similar power be made by such other organizations?

The ORT seeks to diffuse the impression that its demand—notwithstanding its unique origin and purpose—is essentially one indistinguishable aspect of a vast area of collective bargaining directed toward stabilization of employment and job security. If these misty concepts are the sole standards to be applied in determining the legality of collective bargaining proposals, then the racial discrimination cases should, in the view of the ORT, be re-examined. Undoubtedly the objective of the white brakemen in the *Howard* case to secure more jobs for themselves through the displacement of Negro porters can readily be rationalized as one phase of the continuing quest for job security and employment stabilization. It is in this respect that the court below found "no material difference" between the overriding significance claimed for these concepts by the ORT and their presence in the *Howard* case (R. 384). The inquiry into the propriety of a particular proposal is not foreclosed simply because the demand would contribute to job security.

IV.

THE ORT'S DEMAND IS BEYOND THE RANGE OF CONGRESSIONAL CONTEMPLATION AS THE BASIS OF A LAWFUL STRIKE.

- A. The ORT's Demand Is Contrary to Policies Embodied in the Pattern of Federal-State Regulation Fashioned by Congress to Further the Public Interest in an Efficient and Economical Transportation System.

The ORT and the RLEA correctly observe that the Railway Labor Act provides a unique statutory scheme governing the relations of labor and management (ORT Brief,

p. 36; RLEA Brief, p. 19). It is a uniqueness which derives from the special impact on the public interest of interruptions to interstate rail transportation. Thus, this Court in *California v. Taylor*, 353 U. S. 533 (1957), stated (at p. 566):

"Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes. A primary purpose of this machinery of railway government is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein. * * *';"

and in *Virginian Railway* (at p. 552 of 300 U. S.):

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge."

Another source of this singularity is the pervasive system of federal-state regulation of significant phases of interstate railroad operations, including the adjustment of station facilities and services to changing transportation requirements. It is for this reason that—on this record—the issue is not one of a conflict between collective bargaining and managerial prerogative. A regulated utility has, at best, little enough of the latter, as witness the fact that North Western had to justify in advance its managerial

decision about the Central Agency Plan to four separate public agencies. The conflict is rather between the ORT's concept of the uses to which collective bargaining (and the resulting strike threat) can be put, on the one hand, and the federal interest in effective regulation by public authority of interstate commerce, on the other.

The relationship of the provisions of the Railway Labor Act to various aspects of this regulation has previously been considered by this Court. In *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943), the Illinois Commerce Commission directed a carrier to make certain arrangements with respect to the supplying of cabooses for the comfort and convenience of the men operating its trains. The carrier attacked this order on the ground that it had already entered into contractual arrangements under the Railway Labor Act with its employees for the supplying of cabooses, and that those arrangements could not be altered except through changes negotiated pursuant to the Railway Labor Act. In other words, the argument was that Congress, in the Railway Labor Act, had pre-empted the field in such manner that the state statute could not validly be brought to bear. This argument was rejected (at pp. 6-7):

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation."

The Court also stated that the federal interest under the Railway Labor Act "is to see that disagreement about conditions does not reach the point of interfering with interstate commerce." Thus, in the *Terminal* case, where the operation of state regulation provided in itself the framework of agreement, the Railway Labor Act was held not to supersede the effectuation of such state authority.

Previously, in *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249 (1931), this Court had affirmed the decision of a three-judge district court (42 F. 2d 765) which had similarly ruled against the carrier's contention that a Missouri full crew law must fall before the pre-emption of the field represented by the Railway Labor Act, inasmuch as matters relating to the number of persons required to operate a train could only be determined by negotiations relating to "working conditions", as those words are used in the Railway Labor Act. This argument failed for the reason stated below by the district court (at p. 773 of 42 F. 2d):

"They ('working conditions' under the Railway Labor Act) mean such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees. This could not include matters of statutory duty, for such are withdrawn from the volition of either party."

The *Terminal Railroad* and *Norwood* cases involved mandatory regulations in the area of health and safety. *In re Chicago, North Shore and Milwaukee R. Co.*, 147 F. 2d 723 (7th Cir. 1945), cert. den. 325 U. S. 852 (1945), involved the approval by a state commission of revisions in inter-corporate operating agreements. The North Shore had entered into a contract with the Chicago Rapid Transit Company whereby the latter undertook to operate the trains of the former within the Chicago city limits. This contract was subject to the approval of the Illinois Commerce Commission under the state statute, and it was

authorized by that agency. The authorization was permissive in form, as is usual in cases arising by carrier initiative rather than by commission action on its own motion. The employees of the North Shore asserted that their contract gave them the right to the work of operating the trains over the segment of the line in question, and they disputed the right of the Rapid Transit employees to take over that work under the new contract. The specific contention of the North Shore employees was that the Railway Labor Act prevented any change in the arrangements without the negotiation of a change in the existing contract under the procedures of the Railway Labor Act. In reliance on this Court's decisions in *Norwood* and *Terminal Railroad*, the Court of Appeals said (at p. 727):

"The Act does not undertake governmental regulation of working conditions. *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6, 63 S. Ct. 420, 87 L. Ed. 571, nor have we been able to find in the Act an intention to exclude a State from exercising its police power or the right to approve or disapprove the terms and conditions upon which one carrier might allow another carrier to use the former's property or facilities.

"The Illinois Public Utility Act contemplates actual supervision of every public utility so that continuous, adequate, uniform satisfactory service shall be rendered to the public, [case cited] and requires that intercorporate contracts providing for the use by one rail carrier of tracks and facilities of another carrier be approved by the Illinois Commerce Commission.

"The phrase 'working conditions' means such conditions affecting the work of the employees as might be the subject of agreement between North Shore and its employees, *Missouri Pac. R. Co. v. Norwood*, D. C., 42 F. 2d 765, 773, affirmed 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010. The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work re-

quired of employees. It does not exclude a State from exercising its police power. *Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen, supra*, 318 U. S. 6, 63 S. Ct. 420, 87 L. Ed. 571."

These cases established the existence of areas in which the collective bargaining procedures under the Railway Labor Act were not intended by Congress to displace the effectuation of state regulation—whether falling within the area of health and safety, or the area of economic regulation. Cases involving the relation between (1) the limitations imposed by Norris-LaGuardia, (2) the statutory procedures of the Railway Labor Act, and (3) the general common carrier obligations imposed on railroads under the Interstate Commerce Act have also arisen in the federal courts. Two recent cases have held that where a protest strike involving neither a major nor minor dispute would interfere with the performance of common carrier obligations imposed by federal regulatory law, such strike was properly enjoined in the federal courts notwithstanding the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114 (6th Cir. 1957), cert. den. 355 U. S. 877 (1958); and *Norfolk and Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. den. 355 U. S. 914 (1958).

A comparison of *New York Central* and *Norfolk* with the present case suggests that the ORT, in submitting a formal demand for a veto power over the abolition of positions, was well aware of the problems posed by these earlier cases. As in those cases, the determination to strike arises as a protest against the implementation of managerially initiated change. In *New York Central* and *Norfolk*, the courts, in holding Norris-LaGuardia inapplicable, had noted the absence of a properly processed major dispute. Mindful of the lessons of these cases, the ORT moved

early to acquire the strike weapon to prevent the effectuation of the possibly adverse regulatory orders of four state commissions. The vehicle it used was the prior submission of a demand devised with this specific end in view.

Thus; the controlling issue in this case is whether Congress intended that the interruption to interstate commerce which it sought to avoid by enactment of the Railway Labor Act could be permitted to result from a strike to enforce a collective bargaining demand designed to subject the effectuation of a significant aspect of public regulation to the veto power of a private organization. A consideration of the policies underlying careful Congressional formulation of the present pattern of federal-state regulation demonstrates that Congress could not have intended to permit its public purposes to be set at naught through the artful manipulation of the collective bargaining procedures of the Railway Labor Act.

In *Texas v. United States*, 292 U. S. 522, 530 (1934), this Court declared that the Transportation Act of 1920 had "introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service." Referring to the policy considerations underlying the 1920 Act and the Emergency Railroad Transportation Act of 1933, the Court stated further (at pp. 530-1):

"It is a primary aim of that policy to secure *the avoidance of waste*. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Cases cited.] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of

the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the act, 'has direct relation to adequacy of transportation service, *to its essential conditions of economy and efficiency*, and to appropriate provisions and best use of transportation facilities.' "

Subsequently, the Transportation Act of 1940 again amended the Interstate Commerce Act in order to emphasize further the policy considerations referred to in the *Texas case*. Following the passage of the 1940 Act, this Court, in *Seaboard Railroad Company v. Daniel*, 333 U. S. 118 (1948), had occasion to refer to railroad transportation policy in the following terms (at pp. 124-5):

"Congress has long made the maintenance and development of an *economical* and *efficient* railroad system a matter of *primary national concern*. *Its legislation must be read with this purpose in mind.*"

As one method of realizing these objectives, Congress has sought to encourage, through the orderly process of public regulation, the elimination of unprofitable services and operations which have been rendered obsolete by the forces of change. The abandonment of unprofitable branch lines, the consolidation and merger of separate companies, pooled operations, and the elimination of duplicate facilities through joint use of remaining facilities, are among the specific procedures available for the minimization of waste. All of these sources of potential economies are subject to the regulatory authority of the Interstate Commerce Commission, primarily for the purpose of resolving competing considerations of local interests and transportation needs with the broader national interest in a financially solvent transportation system. *Colorado v. United States*, 271 U. S. 153 (1926); *Schwabacher v. United States*, 334 U. S. 182, 191-5 (1948).

Not all aspects of regulation directed toward the fulfillment of these primary economic objectives have been committed by Congress to the Interstate Commerce Commission. Stations and station agency service is one important phase of interstate commerce which Congress has determined can be left for the present to state regulation. This decision was deliberately reaffirmed in connection with an extensive review undertaken by Congress of the relative roles of federal and state agencies in promoting the economic aims of railroad regulation. This review culminated in the Transportation Act of 1958 (72 Stat. 568; 85th Cong. 2d Sess. S. 3778). The legislative history of those aspects of the 1958 Act dealing with the relationship of federal and state regulation demonstrates the interest of Congress in the effective operation of state regulation of stations as an instrument and adjunct of federal policy.

Section 5 of the Transportation Act of 1958, creating a new Section 13a in the Interstate Commerce Act, vests an ultimate jurisdiction in the Interstate Commerce Commission over the discontinuance of trains or ferries, whether in interstate or intrastate commerce. In the form originally submitted to the 85th Congress, 2d Session, in S. 3778 and H. R. 12832, the Transportation Act of 1958 would have created federal jurisdiction over an additional subject by vesting in the Interstate Commerce Commission authority over the discontinuance of "the operation or service of any train or ferry engaged in the transportation of passengers or property in interstate, foreign, and intrastate commerce, or any of them, or of the operation or service of any station, depot or other facility where passengers or property are received for transportation in interstate, foreign and intrastate commerce, or any of them."

Prior to the introduction of S. 3778 by Senator Smathers, hearings had been held during January, February, March

and April of 1958 before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce of the Senate. The report, with recommendations, of the Subcommittee was issued on April 30, 1958. (The report was later published as part of the report of the full Committee on Interstate and Foreign Commerce on S. 3778, issued on June 3, 1958 (S. Report No. 1647).) As originally introduced on May 8, 1958, S. 3778 reflected the views of the Subcommittee which were formulated subsequent to its earlier hearings.

During these hearings there was received a written statement from Commissioner John M. Ropes of Iowa (Hearings, pp. 1815-1828). Commissioner Ropes first suggested that the railroads could achieve greater state cooperation in their efforts to effect necessary economies through more imaginative and comprehensive presentations. Thus, he stated as follows (Hearing, p. 1816):

"The railroads must develop new attitudes and new approaches to problems brought before the state regulatory bodies. Piecemeal requests by the railroads to state commissions for authority to remove trains and agency service fails to impress state regulators. The old axiom, 'Ask and ye shall receive,' should become the policy of the railroads, and each application should be of such magnitude that its relation to the system operation can be readily appreciated. In far too many instances the application is isolated from the overall railroad picture. If the railroads have a program that is salable they must sell it."

As an example of what could be achieved by railroads through more orderly planning, he referred to the agency dualization program of the Minneapolis and St. Louis Railway Company in the following terms (Hearings, pp. 1816-1817):

"Consolidation of some rail services should be made rather than the discontinuance of such service alto-

gether. The Minneapolis and St. Louis Railway Co. has initiated a program in Iowa and surrounding States providing for dualization of agency service in some of the smaller communities located on its line. Other carriers are doing likewise. Briefly, this program provides for 1 man handling the railroad business of 2 or more small communities. Where the program has been inaugurated with the authority of the State commission the people of those communities have been satisfied with the service, and the railroads have made a substantial savings."

Again referring to agency dualization in his oral testimony, Commissioner Ropes said (Hearings, p. 1821):

"For example, the Minneapolis & St. Louis Railway Co., and now the Chicago-Northwestern Railway Co. has initiated in the Midwest, and I imagine surrounding areas, programs to dualize agency service.

"Briefly, this program is one where 1 agent handles the railroad business at 2 or more small communities. We have found where the program has been inaugurated with the permission of the State commission, the people of the communities have been satisfied with the service and the railroads have made substantial savings."

Strong opposition to transferring any existing state regulatory authority over railroad services to the Interstate Commerce Commission was offered by Mr. Leighty, President of both the ORT and the RLEA (Hearings, pp. 1985-2038). Mr. Leighty emphasized that, in his opinion, the states had been very effective in permitting the realization of railroad operating economies. On this point Mr. Leighty said (Hearings, p. 2027):

"The railroads have abandoned entirely too many stations and cut out too much service already, for their own good. State commissions have gone too far in authorizing these cuts."

A principal objection raised by Mr. Leighty to the creation of federal jurisdiction was the burden on protesting communities of requiring them to send representatives to Washington to oppose service discontinuances (Hearings, p. 2028). Mr. Leighty's opposition to any added federal jurisdiction, even while expressing dissatisfaction with the thoroughness of state regulation in permitting economies, is reflected in this exchange with a Subcommittee member (Hearings, p. 2028):

"Senator Purtell. You want it left in these States even though you tell me that some State agencies have permitted the railroads to do as they will?"

"Mr. Leighty. That's right."

On June 3, 1958 Section 4 of the bill containing the proposed new Section 13a to the Interstate Commerce Act was recommended by the full committee to the Senate in the form originally introduced (S. Report No. 1647, 85th Congress, 2d Session; Cong. Rec., page 9966). S. 3778, as recommended by the full committee, was debated on June 11, 1958 (Cong. Rec., pages 10836-10868). During this debate, Senator Russell moved to strike the entire Section 4 of the Act, terming it "a direct and drastic blow to the authority of State regulatory bodies . . ." Like Mr. Leighty during the hearings, Senator Russell made the dual point that state regulation was already effective in permitting the realization of railroad economies and that federal regulation would inconvenience the residents of many local communities by requiring them to present their case in Washington, D. C. Thus, Senator Russell stated (Cong. Rec. [page 10850]):

" . . . it may take a little time for the lawyers for the railroad to act, and it may take a little trouble, but they usually succeed in closing the station. But under this provision the people in small towns would even be denied their day in court.

"I can understand why the railroads might prefer to have all of these matters handled in the Interstate Commerce Commission, but in the long run the railroads usually have their way before most of the local State regulatory bodies, if they have a good and sufficient case."

H. R. 12832, corresponding to S. 3778, was introduced in the House on June 5, 1958 by Rep. Harris (Cong. Rec., page 10345). Section 4 of this House Bill contained a proposed new Section 13a to the Interstate Commerce Act, the first paragraph of which included the same provisions as those found in S. 3778, as originally introduced and subsequently recommended by the full Senate committee. The Bill was referred to the House Committee on Interstate and Foreign Commerce, which, on June 18th in House Report No. 1922, reported its approval of H. R. 12832 together with recommended amendments. The recommended amendments included changes in the proposed Section 13a(1) under which all reference to any "station, depot or other facility" was eliminated. Thus, as recommended by the House committee, federal jurisdiction would have been extended to cover only the discontinuance of trains or ferries.

H. R. 12832, in the form recommended by the House committee, was debated on June 27th (Cong. Rec., pages 12522-12563). During the debate Rep. Roberts expressed opposition to the inclusion in the Bill of the proposed Section 13a, even as amended. The principal basis stated for his objection was that the states, as a whole, were already doing a "good job" with reference to the basic problem of eliminating uneconomical services. In his following comments, Rep. Roberts referred in part to the effect of state regulation in the area of agency discontinuances (Cong. Rec., page 12537):

"I might say that my reservation is to that part of

the bill which virtually by-passes the State Commissions. We had testimony from Mr. McDonald, who is president of the National Association of Railroads and Utilities Commissions. This organization has made a study of this problem for the last 8 years. As far as I have been able to find out, the proponents of this new section, which would virtually emasculate State regulation, did not make out a very good case.

"The figures which are contained in the supplemental views and carried at page 21 of the report show that out of a total of 1,274 applications for abandonment only 197 were refused by the State commissions. This means that almost 86 percent of these applications were granted.

"In the case of agency discontinuances, the figures are almost the same. Out of a total of 2,466 applications there were refusals in only 372 cases."

As finally submitted to conference, the Senate and House versions of S. 3778 differed with regard to the treatment of, any "station, depot or facility." The Senate bill, which had been amended to limit the newly proposed federal jurisdiction to operations or service in interstate and foreign commerce, included within such jurisdiction any "station, depot or facility." As passed by the House, however, S. 3778, while including all trains or ferries in interstate, foreign *and intrastate* commerce, would have created no federal jurisdiction over any "station, depot or facility."

In the version finally recommended to the House and Senate by its conferees, Section 4 of S. 3778, containing the proposed Section 13a to the Interstate Commerce Act, was included as Section 5 of the Act. The issue of including intrastate trains and ferries within the proposed Section 13a was resolved by such inclusion, combined with a distinction in the procedures to be followed in connection with interstate and intrastate train discontinuances. Consistent with the House version, however, all reference

in the proposed Section 13a to any "station, depot or facility" was eliminated.

The report and recommendations of the conference committee were submitted to the Senate and House on July 30th (H. Report No. 2274; Cong. Rec., page 15645). In his explanation of the committee's recommendation, Senator Smathers stated (Cong. Rec., page 15528):

"*** the Senate receded on a provision under which we had given the Interstate Commerce Commission jurisdiction also to discontinue service in transportation, terminals and other such facilities in connection with the operation of railroads. We left that matter in the hands of the State regulatory agencies."

S. 3778 was approved by the House and Senate in the form recommended by its conferees. (Cong. Rec., pages 15529 and 15645-48).

The legislative materials thus suggest that a combination of three factors ultimately resolved the issue against vesting this additional authority in the federal agency: (1) the desire to minimize the restrictions on the jurisdiction of state regulatory agencies, notwithstanding a general recognition of the importance of effecting substantial economies in all areas of railroad operations; (2) a belief that federal jurisdiction over stations and depots would result in hearings distantly located from the communities involved, thus imposing a difficult burden on local interests in being heard; and (3) a frequently expressed conviction that the state commissions were acting with due regard for increased economy and efficiency. There was no suggestion of any lack of concern about the importance of effective regulation in that phase of interstate commerce represented by station services and facilities.

One basis for this vital concern is the direct relationship between branch line abandonments (subject to the jurisdic-

tion of the Interstate Commerce Commission) and the more efficient operation of station agencies (subject to state jurisdiction). The crucial character which this relationship often assumes is demonstrated in a recent branch line abandonment proceeding in which authority was denied in great part because of the failure of the carrier to avail itself fully of potential economies resulting from changes in agency operations. The Interstate Commerce Commission said (*Missouri Pacific R. Co. Abandonment, Crete Branch*, 307 I. C. C. 189 (1959) (at pp. 202-3):

"There are six full-time station agents employed on the branch, one for every 10 miles on a line which runs only one freight train each day. All are employed in stations that were rebuilt during the years 1951-53. Protestants are of the view that the branch could function adequately by eliminating all of these agents, or by employing one, located strategically, to serve the entire branch.

"Applicant concedes that, in the face of then existing operating losses on the branch, no attempt has been made since 1953 to reduce the number of station agents on the branch. It also admits that the stations on the branch were rebuilt under the above-mentioned rehabilitation program even though it was then faced with constant losses resulting from the substantial reduction of traffic on the branch. According to applicant, the elimination of the station agents would result in an annual saving of approximately \$25,000. Even though only half of this sum could be saved, such amount would help reduce the possibility of a deficit."

The orders of the South Dakota and Iowa commissions approving the Central Agency Plan show that the controlling criterion was the public interest in efficient and economical transportation. Both orders reflect an acute awareness of the responsibilities of state regulatory agencies in promoting the dominant national aims of Congress in this area. Thus, these orders, and the similar orders

of the Wisconsin and Minnesota commissions, do not involve purely local interests. They must be considered in their essential role as instrumentalities consciously utilized by Congress to further its aims in an important segment of interstate commerce.

The passenger train analogy is conclusive of the impropriety of this demand. For many years Congress was content to utilize state regulation for this important sector of interstate commerce. Because it came to believe that the federal interest was not being adequately protected by the state commissions, it decided, in the Transportation Act of 1958, to pull this regulation up to the federal level; and the Interstate Commerce Commission was given jurisdiction over passenger train discontinuances. If the unions whose members fill positions in passenger train service were to endeavor to frustrate I. C. C. orders by using the Railway Labor Act to freeze such positions, is it conceivable that the Court would regard this as within what Congress intended to be the objects of that statute? And is the federal interest to be protected any less where, as here, Congress has made a conscious decision to keep on using state regulation for the accomplishment of its purposes in the regulation of station agencies?

The ORT, overlooking this element of federal interest, asserts that *California v. Taylor*, 353 U. S. 553 (1957) and *Local 24 of International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959), establish that state regulation is always to be subordinated to collective bargaining agreements deriving from federal labor relations statutes. The

1. The force of this analogy lies behind the Court of Appeals' comment that (R. 384-5):

"It is perhaps significant that on oral argument, counsel for the Union expressed the opinion that a demand for veto over discontinuing trains, while less reasonable than that proposed here, would constitute a bargainable issue under the Railway Labor Act."

Oliver case involved the relationship between (1) certain long-standing collective bargaining provisions relating to wages previously entered into under the Labor Management Relations Act, and (2) a subsequent state court construction of a state antitrust statute having general application, but only within the area of intrastate commerce. The exercise of state authority did not occur in a regulatory field in which Congress has continued to rely on effective state regulation as a means of furthering its own policies with regard to efficient and economical transportation in interstate commerce.

California v. Taylor holds only that it was the intent of Congress that a state which owns and operates a railroad otherwise subject to the provisions of the Railway Labor Act must stand in the position of management under the Act. That case does not purport to deal with the separate issue of whether Congress intended that collective bargaining procedures of the Railway Labor Act can be used to circumvent state regulatory authority exercised in the national interest. Neither of these cases conflicts with the accommodation between the orders of state public utility regulatory agencies and the collective bargaining provisions of the Railway Labor Act reached in the *Terminal Railroad, Norwood* and *North Shore* cases.

The ORT further suggests that the orders of the state regulatory commissions in this case, being only permissive in form, must give way to its affirmative demands submitted under the provisions of the Railway Labor Act (ORT Brief, p. 56). As noted above, the permissive character of the state regulatory order in the *North Shore* case did not preclude a determination by the federal courts that the Railway Labor Act imposed no disabilities on the effective operation of state authority. But, perhaps even more significantly, Congress itself has chosen to utilize the combination of managerially initiated proposals and per-

missive administrative orders to provide the effectiveness which it seeks in its regulatory enactments. Thus, Interstate Commerce Commission orders, permissive in form though they may be, are not to be regarded as administrative favors bestowed on private interests for purely private purposes. On the contrary, they reflect the essential mutuality of the public, and of the managerial, interest in the avoidance of waste. In this connection Justice Brandeis has stated, with specific reference to branch line abandonments: "The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination." *Colorado v. United States*, 271 U. S. 153, 162 (1926).

Managerial initiative necessarily underlies the system of largely permissive authority which is basic both to federal and state regulation. Managements propose, and the commissions dispose. The importance of such initiative in achieving the public aim of waste avoidance is emphasized in the following criticism made by the Senate Committee on Interstate and Foreign Commerce in its report on S. 3778, culminating in the Transportation Act of 1958 (S. Report No. 1647, 85th Cong., 2d Sess., p. 11):

"The railroad industry has not, in the sub-committee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; joint use of facilities in order to eliminate waste, such as multiple terminals and yards that require expensive interchange operations; reduction of duplications in freight and passenger services by pooling and joint operations; abandonment or consolidation of nonpaying branch and secondary lines; abolishing of unnecessarily circuitous routes for freight movements; improved handling of less-than-carload traffic; coordination of transportation services and facilities by establishment of through routes and joint rates with other forms of transportation; and modernization of the freight-rate structure, including revision of below-

cost freight rates to levels that cover cost and yield some margin of profit as well as adjustment of rates excessively above cost to attract traffic and yield more revenue."

Adaptive response to technological change, for which Congress looks to managerial initiative in the first instance, requires the submission of many proposals for prior approval by regulatory agencies. The primary function of such regulation is to impose a *public veto* in situations where management, in seeking the avoidance of waste, may have failed to give adequate consideration to other aspects of the public interest.

The ORT's demand seeks to displace this public veto with a purely private one. It obscures this assumption of governmental power by saying that the job freeze involved is nothing more than one of the manifold aspects of employment stabilization and job security. Yet the legislative history of Section 5(2)(f) of the Interstate Commerce Act conclusively demonstrates that Congress, in seeking to further the objectives of its National Transportation Policy, has found the job freeze to be incompatible with its legislative purposes (49 U. S. C. Sec. 5(2)(f)).

Section 5(2)(f), enacted as part of the Transportation Act of 1940, provides for mandatory employee protective conditions with respect to all transactions falling within the scope of the unification provisions of Section 5(2) of the Interstate Commerce Act. A detailed resume of important aspects of the legislative history of Section 5(2)(f) is found in *Railway Labor Executives' Association v. United States*, 339 U. S. 142 (1950).

In the legislative proceedings leading to the enactment of the 1940 Act, the labor-management group managing the bill made this recommendation with respect to protecting the interest of employees affected in the bill as originally introduced:

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

When the bill reached the floor of the House, Representative Harrington offered an amendatory proviso which would have quite clearly changed the entire concept, purpose and effect of these provisions:

"Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

The profound change which would have been wrought by this amendment was noted by this Court in the *Railway Labor Executives' Association* case (339 U. S. at p. 151):

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations together with a recognition that employees could and should be fairly and equitably protected. *This amendment, however, threatened to prevent all consolidations to which it related.*"

Recognizing the stultifying effect the proposed amendment would have had on railroad unifications, the Legislative Committee of the Interstate Commerce Commission expressed its strong opposition in the following communication to Congress:

"As for the (Harrington) proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad man-

gements and labor organizations. *The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees.*"

Section 5(2)(f) was ultimately enacted in its present form. The principle of the job freeze was rejected. Congress concluded that it could not embody that principle in the Interstate Commerce Act without compromising the national interest in economical and efficient rail service.

Like Congress in enacting Section 5(2)(f), North Western has recognized the profound distinction between demands calculated to stagnate the process of adaptation to economic and technological change, on the one hand, and proposals to ameliorate the impact on individual employees, on the other. With respect to the latter, the North Western was originally—and remains—a party to the Washington Agreement of 1936. The ORT and RLEA purport to find this agreement indistinguishable from the ORT's proposed power to impose a job freeze (ORT, R. 23-4; RLEA Brief, p. 39). It is, of course, correct to state that the Washington Agreement does deal broadly with the abolition or discontinuance of jobs. But the approach of this agreement is directly contrary to the concept of the job-freeze which the ORT now proposes. In recognition of the inevitable impact of technological change on the number of positions, the Washington Agreement seeks to provide a system of financial benefits for employees who are adversely affected by the abolition of positions. In addition, the record shows the steps which North Western has taken to provide severance pay for displaced employees, and the failure of its efforts to interest the ORT in any such plans.

Thus, the ORT's demand must be carefully distinguished from a proposal for financial benefits for the incumbents of positions abolished in consequence of orders of public regulatory agencies. The proposal seeks instead

to confer ultimate and decisive control over the position itself, together with the power to maintain a complete job freeze. If this job freeze is, as claimed by the ORT, nothing more than a manifestation of employment stabilization and job security, it is nevertheless one which Congress has deliberately rejected in connection with the unification provisions of the Interstate Commerce Act. Having regarded the job freeze as offensive to its purposes under Section 5 of the Act, can it be assumed that Congress intended that the job freeze could, through the collective bargaining procedures of the Railway Labor Act, be imposed on other equally vital phases of the regulatory process, whether administered by federal or state agencies? The question answers itself.¹

The ORT asserts that the decision below "presents a revival of the historic abuses of the judicial process against which the Norris-LaGuardia Act was directed." But we have already been reminded this Term that:

"• • • as the preamble to the Norris-LaGuardia Act indicated, the formulation of policy of that statute was made in 1932 'under prevailing economic conditions.' Congress at different times and for different purposes may gauge the demands of 'prevailing economic conditions' differently or with reference to considerations

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1. It is interesting to note that the statement of National Transportation Policy preceding the 1940 Transportation Act, as originally submitted (S. 2009), and as reported to the Senate by its Committee on Interstate Commerce and passed by it (S. Report No. 433, p. 6; 76th Cong., 1st Sess.; 84 Cong. Rec. 5869, 5873), provided that the provisions of the Interstate Commerce Act were to be administered so as to "• • • encourage fair wages and equitable working conditions *established through collective bargaining* • • •." As reported by the House Committee, however (H. Report No. 1217, 76th Cong., 1st Sess.), the proposed statement of a National Transportation Policy in S. 2009 was amended so as to delete "established through collective bargaining." S. 2009 passed the House with this clause in the form recommended by its committee (84 Cong. Rec. 10127). As finally enacted in the form recommended by a second Conference Committee (H. Report No. 2832, 76th Cong., 1st Sess.), the phrase remained out.

outside merely 'economic conditions'" *United Steelworkers v. United States*, U. S. (1959), concurring opinion.

The same representation was pressed upon the Court in the *Graham* and *Howard* cases, namely, that the federal injunctive relief there involved was an improper dilution of the policies of Norris-LaGuardia. But the process of accommodating existing law to emerging considerations of policy is a continuing one. *Brown v. Board of Education of Topeka*, 347 U. S. 483, 492-5 (1954). It has no less of a role with respect to Congressional policies adopted in differing historical contexts and with reference to distinctive, and frequently divergent, social and economic problems. The Norris-LaGuardia Act can stand as no single exception to this truth. *Allen-Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797, 806 (1945).

Inevitably Norris-LaGuardia must be read in the light of other legislation, including that which seeks to promote an economical and efficient national transportation system. When Norris-LaGuardia and the Railway Labor Act are read in this light, it becomes evident that Congress did not intend that interruptions to interstate commerce by strikes, which it sought to avoid by enactment of the Railway Labor Act, could be founded upon a demand aimed in purpose and effect against the effectuation of regulatory orders directly implementing federal policies.

B. An Improper Demand Imposes No Duty to Bargain and a Strike Founded Upon It Is Properly Enjoined.

The record discloses the continuing efforts of North Western to bargain on a mutually acceptable program to ameliorate the impact of the Central Agency Plan on displaced employees. No less does it disclose the adamant refusal of the ORT to budge from its initial demand for a

veto power over the positions themselves. Thus, on this record, it is appropriate to suggest that those portions of the ORT and RLEA briefs dealing with the duty to bargain are more aptly directed to the ORT itself.

Of more general significance regarding the duty to bargain, whether under Norris-LaGuardia or the Railway Labor Act, are the inevitable implications of the *Howard* case. In the light of that case, could it be urged today that a demand which seeks job security through racial discrimination would impose a bargaining obligation?

Whatever the differences between the subject matter of the contract in *Howard* and the demand for a contract in this case, that case refutes the ORT's contention that Congress intended to provide no more than a framework for bargaining and was unconcerned with the nature of the demands fed into the process.¹ True friends of railway labor

1. The Court of Appeals below, in holding the ORT's contract did not pertain to "rates of pay, rules, or working conditions" under the Railway Labor Act because of its conflict with regulatory authority, observed in the course of its opinion that "• • * the demand is not within the scope of mandatory bargaining (R. 382)." The citation of *N. L. R. B. v. Borg-Warner Corp.*, 356 U. S. 342 (1958) followed. In *Borg-Warner* this Court had held that the employer's proposals in issue were not within the applicable standards of "wages, hours, and other terms and conditions of employment," under the National Labor Relations Act, and were, therefore, beyond the scope of mandatory bargaining.

The court Below then proceeded to cite the racial discrimination cases as establishing the concept of contract proposals, unlawful in the sense of not being within the scope of the Railway Labor Act (R. 384). Because the racial discrimination cases did not utilize a convenient phrase to express this concept, the Court of Appeals had thus found it useful to cite the phraseology of *Borg-Warner* concerning the scope of mandatory bargaining. Even while characterizing the court's use of *Borg-Warner* as "presumptuous", the ORT concedes the validity of the limited proposition for which it was used (ORT Brief. p. 40): "Either the subject of the proposal is one on which agreement would be unlawful, or it is one with respect to which bargaining is mandatory." Congress did not create an administrative agency under the Railway Labor Act to determine the lawfulness of particular contract proposals. The function of resolving issues of lawfulness has, therefore, devolved upon the federal courts, where it has in fact been exercised.

will recognize what a double-edged sword is concealed within that claim. For the Railway Labor Act is not a one-way street; it provides for demands by management as well as by labor, with a resulting right in the former to terminate the employment relation after exhaustion of the non-compulsory processes of the Act. Will the ORT concede that its members may be legally locked out upon the basis of any demand the North Western may choose to serve, and to stand upon, under Section 6, no matter how outrageous in its purpose and effect with respect to independent unionism? It could not, without betraying the cause of railroad labor.

The inescapable teaching of *Howard* is that this Court sits to proclaim and protect the dominant policies of Congress as this Court finds them to be in any particular case. If the vindication of those policies requires the scrutiny of a demand made under Section 6, then that must and will be done. No amount of generalizing about the benefits of collective bargaining can foreclose this inquiry. Unlimited collective bargaining for a regulated industry may not, in the view of Congress, be invariably superior to the integrity of the regulatory process itself. After all, a regulated railroad cannot stop rendering service to the public because it disagrees with a regulatory decision. No more could Congress have intended that the railroad's employees can acquire the power to stop that service by a collective bargaining demand expressing their disagreement with a regulatory decision.

Any industry must and should make provision for the human costs of change. What cannot be stifled, consistently with the public interest, is change itself. Had the approach of the Luddite rioters of 1812 prevailed, with what material resources would England have sustained its lonely grandeur of 1940? Congress cannot be taken to be oblivious of the implications for the present hour of the sapping

of national strength by freezing wasteful jobs into the industrial structure. How plain this is in the case of a regulated utility not free to define waste unilaterally, but under the necessity of proving that waste exists to the satisfaction of a public agency! Congress, having expressly contemplated this necessity in aid of its policy of fostering economical and efficient transportation in interstate commerce, can hardly be deemed to have made the Railway Labor Act a vehicle for the frustration of that policy by a private group.

V.

THE PROPRIETY OF THE ORT'S DEMAND UNDER THE MORATORIUM PROVISIONS OF AN EXISTING AGREEMENT CREATED A MINOR DISPUTE PRESENTLY PENDING BEFORE THE ADJUSTMENT BOARD.

The ORT and North Western, together with all of the major railroads and most of the labor organizations, were parties to the National Agreement of November 1, 1956 (R. 263-84). Article VI of that agreement (R. 268-9) contains a moratorium clause which provides in substance that the parties thereto will not, during the period ending October 31, 1959, serve any notice under Section 6 of the Act which, among other things, will operate to "establish agreements providing the rate of compensation, covering * * * time paid for but not worked * * *." While the dispute created by the proposal made by the ORT was still being handled on the property, North Western formally notified the ORT that it considered the latter's proposal to be barred by the terms of this moratorium; and it has formally submitted that issue to the Adjustment Board, which has received and docketed the submission and where the issue is pending for determination.

If North Western is correct in its interpretation of the

moratorium clause as it relates to the ORT's present proposal, there would clearly be no right to strike to enforce the demand. With this issue actually submitted to and pending before the Adjustment Board for exclusive and final determination, the District Court, under *Chicago River*, was bound to grant an injunction on this ground alone.

The ORT has sought to avoid this result by the contention that North Western is wrong in its construction of the moratorium provisions. On its merits this argument seems to rest on the point that the moratorium provisions contain an exception for proposals relating to "stabilization of employment," and that the ORT's proposal falls within this exception. As *Chicago River* clearly holds, however, the proper place for the resolution of these opposing contentions is the Adjustment Board. The only question bearing on the merits which might be appropriately considered by the courts is that of the substantiality of the position taken by North Western with respect to the moratorium provisions. If that position is not merely frivolous, then the concern of the courts with the merits is at an end.

There is no lack of substance in fact. This is plain from a reading of the formal submission of the issue made by North Western to the Adjustment Board (R. 247-300); and, in particular, from the earlier holding of Judge Nathan Cayton as neutral chairman of a Special Board of Adjustment (R. 292-6). In this case Judge Cayton sustained the railroads' position that the moratorium barred a contract proposal for a "stabilized season of employment for all ore dock employees *** for a period of not less than eight (8) months consisting of not less than 1,386 $\frac{1}{2}$ hours *** in each calendar year." He said (R. 291):

"It seems clear that the proposal here made in behalf of ore dock workers would increase their rates of

pay (fixed in preceding Articles of the Agreement) by, in effect, providing for their compensation on a seasonal rather than an hourly or weekly basis, and *without regard to the needs of the industry or the amount or volume of its business. This is not stabilization of employment in any reasonable or fair sense."*

Surely it cannot be said, in the light of the relevance of these comments to the retroactive job freeze proposal made by the ORT, that North Western's claim as to the ban of the moratorium provisions is a purely frivolous one. The record shows that another railroad, the Minneapolis and St. Louis, had previously submitted the same issue to the Adjustment Board, arising from an identical demand made by the ORT (R. 152, 313). When the District Court stated that the moratorium provisions did not apply; it was ruling on the merits of North Western's claim; and it thereby erred in deciding an issue committed by Congress to another agency.

Another avenue of escape attempted by the ORT is the assertion that North Western's claim of the ban of the moratorium provisions was tardily raised. But, as the record shows, the claim was made while the issues raised by the ORT's contract proposal were still being handled on the property (R. 70, 100, 107). In the absence of any specific time limitation fixed by law for the making of such a claim, the only measure of delay, in the terms of any penal consequences to be attributed to it, is that of injury suffered by the ORT because of the alleged delay. The ORT showed no injury of any kind on the record, presumably because it could not. The decision of the District Court did not turn in any degree upon this charge of delay.

VI.

THE DISTRICT COURT HAD JURISDICTION.

The ORT has chosen to urge in this Court for the first time a jurisdictional issue neither argued nor decided in the courts below. The ORT suggests the absence of diversity, and then addresses its arguments on the merits to the separate question of jurisdiction.

North Western's claim to injunctive relief is expressly predicated on Sections 1331 and 1337 of the Judicial Code; the Railway Labor Act; and the Interstate Commerce Act (R. 5). The right not to be subjected to a strike on the facts of this record is asserted to accrue to North Western under these federal statutes relating to interstate commerce.¹ If this claim of right is not simply frivolous, there was jurisdiction in the District Court to hear and determine it, whatever its merits or whatever limitations might be found to exist with respect to the particular relief sought. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951), and *Romero v. International Terminal Co.*, 358 U. S. 354 (1959). This distinction was recently given effect by the Court of Appeals for the Second Circuit when, in speaking of a federal claim of right asserted by an employee under the Railway Labor Act, the court said:

"• • • (Plaintiff) asserts this claim against both the railroad and the union. Whether he is right or

1. The ORT cites *Gully v. First National Bank*, 299 U. S. 109 (1936). The following basic test for federal jurisdiction is there stated (299 U. S. at p. 112):

"The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

wrong, there is jurisdiction, 28 U. S. C. Sections 1331, 1337, even without diversity * * *

Cunningham v. Erie Railroad Company, 266 F. 2d 411, 414 (2d Cir. 1959); and see *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955), cert. den. 350 U. S. 967.

Chicago River, where no diversity existed and the jurisdictional allegations were identical with those made by North Western, is ample authority on this point. In stating that no issue of jurisdiction was raised in that case, the ORT is wrong (ORT Brief, p. 48). The answer expressly challenged federal jurisdiction in these terms:

"3. Referring to Paragraph 8 of the Amended Complaint, defendants deny that this Court has jurisdiction of this suit. They deny that this is an action arising under the Constitution of the United States on the Fifth Amendment or the laws regulating commerce. They deny that this Court has jurisdiction of this action under the provisions of 28 U. S. C. 1331 and 1337, or of 45 U. S. C. 151 *et seq.*, or 49 U. S. C. 1 *et seq.*, or under any provisions of the aforesaid statutes. * * *"

In *Brotherhood of Railroad Trainmen v. T. P. & W. R. R.*, 321 U. S. 50 (1953), this Court did not find it necessary to resolve the jurisdictional issue. It, therefore, left undisturbed the holding of the Court of Appeals that a claim of federal right was properly rested upon the general common carrier obligations imposed on the railroad under the Interstate Commerce Act. *T. P. & W. R. R. v. Brotherhood of Railroad Trainmen*, 132 F. 2d 265, 268-70 (1942). This decision was followed in *Brotherhood of Railroad Trainmen v. New York Central R. Co.*, 246 F. 2d 114, 119-22 (1957), cert. den. 355 U. S. 877 (1958), Judge (now Mr. Justice) Stewart dissenting.

The federal right asserted here by North Western is not derived solely from its general obligations under the Interstate Commerce Act. It comprehends as well a right under the Railway Labor Act to be free from a strike founded upon a demand having the demonstrated purpose and effect of frustrating regulatory orders in aid of Congressional policies. In this respect, the conflict between the threatened strike and the regulatory process is more direct and potentially disruptive of Congressional aims than those involved in *T. P. & W.* and *New York Central*.

VII.

THE EMERGENCY MEDIATION GAVE RISE TO A SECOND 30-DAY COOLING OFF PERIOD.

The District Court's order granting injunctive relief on the merits expired September 19, 1958, and is now moot. The Court of Appeals did not pass upon it.

The ORT has devoted the major part of its argument to the contention that Section 5, First, of the Railway Labor Act imposes no cooling off period upon labor. This view is not shared by the Mediation Board (Brief, pp. 4-5) and see *Brotherhood of Railway and Steamship Clerks v. Railroad Retirement Board*, 239 F. 2d 37 (D. C. Cir. 1956), in which the court said (at p. 43):

"We must agree with the Board's ruling that a strike can violate the Railway Labor Act although it was not commenced during the period after creation of an emergency board. * * *"

In any event, there is no issue on this record as to a cooling off period after the first mediation.

With respect to a second cooling off period after a mediation pursuant to a proffer of services, the language of Section 5, First (see pp. 6-7 of the ORT Brief) is con-

trolling. The key words for present purposes are the first three in the third full paragraph, namely, "(I)n either event". These can only be reasonably read to refer to each of the preceding two paragraphs, the first of which relates to mediation pursuant to invocation by the parties, and the second to mediation pursuant to a proffer of services. The purpose of mediation, as conceived of by Congress, is obviously the same in both cases, that is to say, to bring the parties together in the hope that the confrontation may be fruitful, in terms of voluntary agreement, for the prevention of devastating interruptions to interstate commerce. Once the connection has been made through mediation, Congress thought it essential that a period of time be provided in which the beneficial results of the connection might manifest themselves. The requirement of a 30-day period provides such time.

The specific question which the District Court had to decide was, does the 30-day provision in the last paragraph of Section 5, First, apply in the case of either type of mediation? Its answer in the affirmative is consistent not only with the letter of the statute, but it is also fully in the spirit which prompted Congress to state its basic purpose in enacting the Railway Labor Act to be "(1) To avoid any interruption to commerce or to the operation of any carrier engaged thereon." 45 U. S. C. Sec. 152.

The Mediation Board submits that the statutory scheme gives no indication that Congress intended the creation of a second 30-day cooling off period subsequent to the Board's proffer of emergency mediation. The District Court's contrary construction not only corresponds to the statutory language, but is consistent with a Congressional purpose to delay strikes whenever the Board finds an emergency sufficiently serious to warrant its proffer of services, notwithstanding any prior mediation invoked by either party.

VIII.

THE DISTRICT COURT HAD POWER TO GRANT AN INJUNCTION PENDING APPEAL.

The ORT asserts that the District Court lacked power to grant an injunction pending appeal in view of its conclusion that the Norris-LaGuardia Act deprived it of jurisdiction to grant North Western injunctive relief on the merits beyond September 19, 1958. The Court of Appeals, in holding that a permanent injunction beyond that date should have been entered, did not reach this point.

This claim of an absolute lack of power was urgently pressed upon the District Court at the time the injunction was entered, and it was renewed later on a motion to dissolve. It was the subject of a motion to dissolve in the Court of Appeals; of a petition to this Court for certiorari in advance of judgment, and of a motion for leave to file mandamus against the Judges of the Court of Appeals; and of an application for a stay to the Circuit Justice. These were uniformly unsuccessful; and were supported by the same arguments once again urged upon this Court.

The action of the District Court was expressly authorized by the terms of Rule 62(c) of the Federal Rules of Civil Procedure. The ORT argues, however, that an implied exception must be read into that Rule making it inoperative in cases where Norris-LaGuardia applies. The ORT's argument on this point is devoted entirely to the contention that the Federal Rules of Civil Procedure did not amend the Norris-LaGuardia Act. The merit of this claim, however, necessarily rests on the proposition that the Norris-LaGuardia Act itself withdrew from the District Court the power to grant injunctions pending appeal. The ORT cites no authority whatsoever in support of this proposition, and indeed does no more than make a flat

assertion of its truth. It is important to note that the ORT's argument, although confined in terms to the power of the District Court, would also deprive both the Courts of Appeals and the Supreme Court of the power to grant injunctions pending review. In every case where a District Court decided that Norris-LaGuardia precluded injunctive relief, therefore, its decision would for all practical purposes be non-reviewable, regardless of whether there was a substantial question as to the correctness of that decision or whether it conflicted with the decisions of other courts. In other words, a strike could take place that would render moot any subsequent review of the correctness of the trial court's decision.

Apart from any question arising out of Norris-LaGuardia, there is no doubt that the federal courts, both at the district level and those of appellate jurisdiction, have had from the beginning the power to grant injunctions pending appeal, even though a permanent injunction has been denied on the merits. This power is presently embodied in the All-Writs Statute (28 U. S. C. 1651), and Rule 62 of the Federal Rules of Civil Procedure, which carries forward the similar provisions of former Equity Rules 93 and 74. It has been reaffirmed by a continuous line of decisions:

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79 (1901).

Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission, 222 U. S. 582 (1911).

Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U. S. 212 (1922).

Magnum Import Co. v. Coty, 262 U. S. 159 (1923).

Beaumont Sour Lake & W. Ry. Co. v. United States, 282 U. S. 74 (1930).

Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210 (1932).

Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U. S. 4 (1942).

The purpose of this power is obvious: It is to minimize damage to the public as well as to litigants, and to make possible appellate review of the matter in controversy.

Whether an injunction pending appeal will be granted in a particular case is a matter which, of course, lies in the discretion of the trial court. The ORT does not charge, however, that the action of the District Court was an abuse of its discretion in any respect. Its claim goes solely to the question of power.

Given the existing power of the federal courts to issue injunctions pending appeal, what then may be found in Norris-LaGuardia which withdraws that power?

Sections 1 and 2 of that Act on their face are directed only to (1) permanent injunctions, and (2) the preliminary restraining orders and temporary injunctions which precede the trial court's final decision. There is no reference to stays or injunctions pending appeal in either these sections or Section 10 (29 U. S. C. § 110), which deals with review of orders which issue or deny a temporary injunction.

Nor does the legislative history of the Act offer any support for the ORT's contention. Prior to its passage, Norris-LaGuardia received extensive consideration both in committee and upon the floor of Congress.¹ The evils at

1. As enacted by the 72d Congress in 1932, the Norris-LaGuardia Act was the outgrowth of two bills, H. R. 5315 and S. 935. See Hearings before Committee on Judiciary on H. R. 5315, 72d Cong., 1st Sess. (1932); H. R. Rep. No. 669 on H. R. 5315, 72d Cong., 1st Sess. (1932); Sen. Rep. No. 163 on S. 935, 72d Cong., 1st Sess. (1932); Conference Reports—H. R. Rep. Nos. 793 and 821, 72d Cong., 1st Sess. (1932); also, 75 Cong. Rec., Part 15 Index re H. R. 5315 and S. 935 (1932).

Similar bills were introduced previously in Congress. The legisla-

which the statute was aimed, and the scope and meaning of its various provisions, were gone over at length. Yet in all the hearings, reports, and debates there is not one reference to the power of the federal courts to issue injunctions pending appeal. It is in fact apparent from the legislative history that the focus of concern was the granting of preliminary and permanent injunctions by the District Courts, and that the situation in which the District Court denied a permanent injunction was not considered.

Unable to find anything in either the language or the legislative history of Norris-LaGuardia to support its claim, the ORT relies heavily upon the fact that the District Court's denial of injunctive relief was based upon a supposed lack of "jurisdiction." This argument rests upon the misconception that Norris-LaGuardia must be viewed in isolation.

The ultimate issue in this litigation is whether the public policies incorporated in the Railway Labor Act render the proposed strike illegal and thereby within the jurisdiction of the District Court to enjoin. Since the reviewing courts clearly have jurisdiction to determine whether that jurisdiction exists, it was wholly appropriate for the District Court to preserve existing conditions until this determination could be made. Cf. *Merrimack River Savings Bank v. City of Clay Center*, 219 U. S. 527 (1911); *United States v. United Mine Workers*, 330 U. S. 258, 289-90 (1947).¹

tive history of these bills likewise contains no reference to injunctions pending appeal. See Hearings before Sub-Committee of Committee on Judiciary on S. 1482, 70th Cong., 1st Sess. (1928); Sen. Rep. No. 1060 on S. 2497, 71st Cong., 2d Sess. (1930).

1. To permit an exception to the power to grant stays in cases where dismissal was based on "lack of jurisdiction" would have far-reaching consequences, since so many federal statutes limiting the award of injunctive relief do so in jurisdictional terms. See e.g., 28 U. S. C. 1341 (enjoining collection of state taxes); 28 U. S. C. 1342 (enjoining rate orders of state agencies); 28 U. S. C. 2283 (enjoining proceedings in state courts); cf. 28 U. S. C. 1331 (federal question jurisdiction); 28 U. S. C. 1332 (diversity jurisdiction).

The ORT thus fails to show any basis for its restrictive reading of Norris-LaGuardia, much less the explicit language which this Court has held to be required in order to deprive the courts of a power so long established and so vital to judicial administration. This is made clear by the decision in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4 (1942). That case involved review of an order of the Commission under Sec. 402(b) of the Communications Act of 1934 (48 Stat. 1064, 1093). That section, which governs review of orders granting or refusing permits and licenses, contains no provision with respect to the stay of the Commission's orders pending review. Sec. 402(a) of the Act, on the contrary, which governs review of all other types of orders by the Commission, expressly grants the power to stay. It was therefore argued by the Commission that Sec. 402(b) must be construed as withholding such power from the reviewing court. This Court strongly rejected that claim in the following language (316 U. S. at 9-11):

"No court can make time stand still. The circumstances surrounding a controversy may change irreversibly during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U. S. 200; *In re McKenzie*, 180 U. S. 536."

* * * * *

"These controlling considerations compel the assumption that Congress would not, without clearly

expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. * * *

Noting that among all the varied statutory provisions dealing with stays pending review, only one, the Emergency Price Control Act of 1942 (50 U. S. C. App. § 924(b)), explicitly withdrew the power, the Court remarked (316 U. S. at 17):

"* * * Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war."

Norris-LaGuardia must be regarded therefore as leaving intact the power to issue an injunction pending appeal, and, in point of fact, the District Courts have continued to exercise that power in cases where the Act was thought to require a dismissal on the merits. See *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir., 1956), *aff'd* 353 U. S. 30 (1957); *Norfolk and Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir., 1957), *cert. den.* 355 U. S. 914 (1958); *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir., 1945), *cert. den.* 325 U. S. 852 (1945).

Since Norris-LaGuardia did not withdraw the power to grant an injunction pending appeal, the ORT's argument as to the meaning and effect of the Federal Rules is beside the point. So far as the Rules are at all relevant, however, they are adverse to the ORT's position.

Rule 62(c), as the ORT must concede, clearly authorizes the issuance of injunctions pending appeal. That Rule, together with the balance of the Rules, was, as required by the enabling act, laid before Congress for its scrutiny before it could become effective. (Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064, 28 U. S. C. § 2072). Congress per-

mitted the Rule to become effective, and in so doing presumably indicated that it found nothing therein which constituted an abridgement of any right conferred by the Norris-LaGuardia Act, which had been enacted only five years before. See *Sibbach v. Wilson & Co.*, 312 U. S. 1, 15-16 (1941).

Rule 65(e), set forth below,¹ upon which the ORT relies, does not compel a contrary result, when considered in context with the enabling act under which the Rules were promulgated and with Rule 82. The enabling act provides that the Rules shall not modify the substantive rights of any litigant; Rule 82 declares that the Rules shall not be construed to extend or limit jurisdiction. So far as any substantive rights or limitations upon jurisdiction found in Norris-LaGuardia are concerned, therefore, it was not necessary for the Rules to make any specific reference to that Act. Norris-LaGuardia, however, also contains provisions with respect to the issuance of restraining orders and preliminary injunctions which may be deemed procedural. Since Rule 65 also deals with those matters, it was therefore necessary to provide, in Rule 65(e), that the provisions of this Rule should not supersede those of Norris-LaGuardia.

It is correct, as the ORT argues, that Rule 65 was also not intended to modify any other provisions of Norris-LaGuardia. The point is, however, that Rule 65, with or without the saving clause, could not affect any provisions of Norris-LaGuardia except those concerning temporary

1. Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges. As amended Dec. 29, 1948, effective Oct. 20, 1949.

restraining orders and injunctions (other than stays pending appeal), for that is all that Rule 65 deals with.¹ When it came to dealing, in Rule 62, with injunctions pending appeal, no saving clause referring to Norris-LaGuardia was included—a clear indication that that Act was not thought to contain any special limitations upon the traditional power to issue injunctions pending appeal.

What is involved here is not, therefore, the denial of any substantive rights. This view was apparently shared by the representatives of organized labor who attended the hearings before the Committee on the Judiciary. While voicing objections to Rule 65, as well as to several other of the proposed Rules, they made no comment whatever when Rule 62(c) was read and explained. Hearings before the Committee on the Judiciary of the House of Representatives, 75th Cong., 3d Sess., pp. 37-40, 48-50, 125.

What Rule 62(c) expressly contemplates is that the enjoyment of such rights as the District Court considers the ORT to have may be postponed by the District Court pending appellate review in a proper case, in order to prevent irreparable injury to the public. The ORT makes no claim, as it could not upon this record, that this was not such a proper case, assuming the power to exist. It denies only that this power exists anywhere in the federal judicial system.

This is a sweeping claim indeed. It assigns to the right to strike an immunity from the ordinary workings of the

1. The explanation by Mr. Mitchell (quoted at p. 61 of the ORT's brief) of the specific reference in Rule 65(e) to "temporary restraining orders and preliminary injunctions" contains the following additional sentence, omitted in the quotation:

"Doubtless the reason the advisory committee used the phrase 'temporary restraining orders and preliminary injunctions' was that they understood that everything in rule 65 was limited to temporary restraining orders and preliminary injunctions." Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, Third Session, p. 165.

judicial process not enjoyed by any other litigant. Its establishment could rest only upon the most unmistakable expression by Congress of a purpose to create this immunity. But there is no such expression.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CARL MCGOWAN,

JORDAN JAY HILLMAN,

400 West Madison Street,

Chicago 6, Illinois,

Attorneys for Respondent.

EDGAR VANNEMAN, JR.,

ROBERT W. RUSSELL,

Of Counsel.

**THE COUNCIL OF RAILROAD TRADE ASSOCIATIONS, A VOLUNTARY
ASSOCIATION OF THE RAILROADS**

**CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
A CORPORATION, Respondent.**

**ATTORNEY FOR DEFENDANT
CHICAGO AND NORTH WESTERN RAILWAY COMPANY
OR
WILLIAM J. HANLEY
P. O. BOX 1000
WICHITA, KANSAS**

December 28, 1960

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 100

THE ORDER OF RAILROAD TELEGRAPHERS, a Voluntary
Association, et al., *Petitioners*,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
a Corporation, *Respondent*.

BRIEF ON BEHALF OF THE NATIONAL
ASSOCIATION OF RAILROAD AND UTILITIES
COMMISSIONERS, AMICUS CURIAE

PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization, the membership of which embraces the members of the transportation and public utility regulatory commissions and boards of the several States of the United States except Alaska.

The Association's interest in this proceeding is on behalf of the state commissions and boards represented

in the membership of the Association, which state agencies are charged by state laws with the duty and responsibility of regulating the rates and services of rail carriers operating in their respective states.

STATEMENT OF THE CASE

On November 5, 1957 the Chicago and North Western Railway Company, hereinafter called "North Western", filed an application with the South Dakota Public Utilities Commission seeking authority to close 69 one-man railroad agency stations on its lines in South Dakota, or as an alternative to such authorization by the Commission, North Western offered and proposed to inaugurate a central agency service plan by which one station agent from a central point would be required to render agency service at one or more adjacent stations.

Hearings were held before the Commission in Pierre, South Dakota on November 25 and 26, 1957 and on December 18, 19 and 20, 1957. Additional hearings were held at Huron, South Dakota on January 13, 1958 and at Rapid City, South Dakota on January 16 and 17, 1958. The order of Railroad Telegraphers, hereinafter referred to as "Telegraphers", appeared as a protestant to the granting of this application.

On May 9, 1958, the South Dakota Commission entered its order in this matter (Order No. F-2499) wherein it was ordered

"that the Chicago and North Western Railway Company be, and is hereby, authorized and directed to forthwith inaugurate and put into effect its proposed central agency station plan . . ."

Among the findings of the Commission were the following:

"3. That the agent's work load as shown by statistics of record at subject stations varies from 12 minutes per day at Farmer to 2 hours per day at Onida, with an average work load of .50 minutes per station at the 69 subject stations.

"4. That the maintenance of full-time agency service of 8 hours per day, 5 days a week, at full time pay is not required by public convenience and necessity at each one of the subject railroad stations and part-time service will avoid closing the stations completely.

"5. That the maintenance of full-time agency service at all of the subject stations, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates, and that an order be forthwith issued that the proposed central agency plan be effectuated."

Similar petitions seeking authority to place into effect the central agency plan were filed with the Iowa Commission on January 24, 1958, with the Minnesota Commission on January 24, 1958 and with the Wisconsin Commission on April 14, 1958. Each of these Commissions authorized the plan to be put into effect; the Iowa Commission on August 11, 1958, the Minnesota Commission on November 12, 1958 and the Wisconsin Commission on January 20, 1959. North Western began putting the central agency plan into effect in South Dakota on May 14, 1958.

On December 19 and 23, 1957, the Telegraphers served notice on North Western under Section 6 of the Railway Labor Act, requesting that existing col-

lective bargaining agreements be amended by adding the following provisions:

"No position in existence on December 3, 1957 will be abolished or discontinued except by agreement between the Carrier and the Organization."

It should be noted that this notice was served approximately six weeks after the application to effect the central agency plan had been filed with the South Dakota Commission and after two hearings had been held by that Commission. What the Telegraphers sought to obtain was a *restraining order* power in the event the Commission granted the application of North Western.

North Western did not consider this provision to be legally within the scope of Section 6 of the Railway Labor Act. After certain fruitless mediation and arbitration procedures, North Western was confronted with the threat of a strike and sought injunctive relief, which has led to the presentation of the case to this Honorable Court.

If the requested contractual provision had been agreed to, it would put the Telegraphers in a position to prevent the abolition of any station agency or the inauguration of the central agency plan. This would have the necessary effect of completely nullifying the orders of the state regulatory commission issued in regard to these matters in the public interest.

The issues involved in this case are of great importance to the state regulatory commissions and to the general public of the respective States, for they involve the question of whether the Congress of the United States intended that the police powers of the states exercised in regulating transportation agencies in the

interest of the public should be thwarted by private contractual agreements under the Railway Labor Act.

STATEMENT OF POSITION.

It is the position of this Association that orders of a state regulatory commission issued in the public interest may not be thwarted by private contractual agreements under the Railway Labor Act.

ARGUMENT

. It is a basic tenet of public utility regulation that private contract rights must give way before regulation in the public interest.

In *Nebbia v. New York*, 291 U. S. 502, 523, this Court stated:

“Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.”

In *Manigault v. Springs*, 199 U. S. 473, 480, this Court stated:

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may

thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

With reference to regulation of utility rates under a state public utility act, this Court stated in *Midland Realty Co. v. Kansas City P. & L. Co.*, 300 U. S. 109, 113:

"But the State has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them. . . . It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the Commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature."

Utility contract rights have continuously been held to be subject to the power of the legislature or to its authorized delegate, in this instance the public utilities commission. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467; *Producers Transport Co. v. Railroad Commission*, 251 U. S. 228; *Union Dry Goods Co. v. Georgia Public Serv. Corp.*, 248 U. S. 372.

As stated by the Circuit Court in the instant proceeding:

"A carrier may not escape its obligations by bargaining them away. The Commission orders

may not be circumvented by a contract entered into by a carrier and a union under threat of strike."

It is axiomatic that such a premise exist. For if that were not the case, the power of the legislature and its delegate, the public utilities commission, would be reduced to a nullity and the commission form of regulation so evident in this country would be without foundation.

This being true, the question then becomes: Did the Congress of the United States intend to circumscribe the exercise of state regulatory authority in the field of station agencies through the enactment of the Railway Labor Act or is the Railway Labor Act to be interpreted as consistent with the wishes of Congress? If the latter is the case, the machinery of the Railway Labor Act would be applicable to matters wherein the carrier had the volition to contract and would not serve to circumvent regulatory orders of a state commission.

In *Missouri Pac. R. Co. v. Norwood*, 42 F. 2d 765, aff'd 283 U. S. 249, it was contended by the carriers that the Missouri Full Crew Law was invalid because it related to "working conditions" under the Railway Labor Act, a field preempted by the Congress of the United States. The District Court stated:

"They ('working conditions' under the Railway Labor Act) mean such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees. This could not include matters of statutory duty, for such are withdrawn from the volition of either party."

In the case of *In Re Chicago, North Shore and Milwaukee R. Co.*, 147 F. 2d 723, cert. den. 325 U. S. .

852, there was a dispute between employees of the Chicago North Shore and Milwaukee Railroad and the employees of the Chicago Rapid Transit Company as to which employees should operate the trains of the former from the city limits to a downtown terminal. The employees of the North Shore contended that they had a contract to conduct such operations. The Illinois Commerce Commission had approved a contract between the two carriers providing for part of the operation to be performed by employees of the Rapid Transit Company. The employees of the North Shore contended that the Commission order was invalid inasmuch as the operations were a subject for negotiation under the Railway Labor Act. The Court of Appeals rejected this contention:

“(3) The Act does not undertake governmental regulation of working conditions, Terminal Railroad Association v. Brotherhood of Railroad Trainmen, 318 U. S. 1, 6, 63 S. Ct. 420, 87 L. Ed. 571, nor have we been able to find in the Act an intention to exclude a state from exercising its police power or the right to approve or disapprove the terms and conditions upon which one carrier might allow another carrier to use the former's property or facilities.

“(4) The Illinois Public Utility Act contemplates actual supervision of every public utility so that continuous, adequate, uniform satisfactory service shall be rendered to the public, City of Chicago v. Alton R. R. Co., 355 Ill. 65, 74, 188 N. E. 831, and requires that intercorporate contracts providing for the use by one rail carrier of tracks and facilities of another carrier be approved by the Illinois Commerce Commission. Ill. Rev. Stat. 1943, Chap. 111-2 3, § 27.

“(5, 6) The phrase ‘working conditions’ means such conditions affecting the work of the employees

as might be the subject of agreement between North Shore and its employees, Missouri Pac. R. Co. v. Norwood, D. C., 42 F. 2d 765, 773, affirmed, 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010. The Act does not fix or authorize anyone to fix generally applicable standards for working conditions, and the term 'working conditions' does not include any and all circumstances concerning work required of employees. It does not exclude a State from exercising its police power. Terminal Railroad Ass'n. v. Brotherhood of Railroad Trainmen, *supra*, 318 U. S. 6, 63 S. Ct. 420, 87 L. Ed. 571."

The decisions in these cases certainly seem controlling of the issues in the instant proceeding.

The brief of Petitioners contend that this issue presents a conflict between the orders of the State regulatory commissions and intent of Congress as embodied in the Railway Labor Act. This is not the case. The Congress has knowingly and consciously left the regulation of station agencies to the state commission.

Federal legislation preempting the regulation of railroad rates and service of a local nature had its genesis in the Transportation Act of 1920. The enactments to Section 13 of the Interstate Commerce Act at that time, however, related only to local rates and Congress chose to leave the regulation of local service matters to the state commissions.

Throughout the hearings before Congressional committees which proceeded the passage of the Transportation Act of 1920 no one discussed the provisions of Section 13 in terms of anything but rates and no one asked that the police powers of the States be otherwise interfered with. In hearing before the Newlands Committee (reported as a part of the hearings before the

Senate Committee on Interstate Commerce upon Extension of Tenure of Government Control of Railroads, 65th Congress, 3d Session) Mr. Julius Kruttschnitt, Chairman of the Executive Committee, Board of Directors of the Southern Pacific Company made a statement, from which we quote:

"Mr. Kruttschnitt: There is a control of certain expenses that I do not see how you can take out of the hands of the States—that is, as to these local matters. I enumerated the demands made upon us for useless stations as one of the handicaps we labor under.

"Mr. Sims: Why can't that power now exercised by the States be taken out and placed under the control of the Federal government, as well as any other power exercised by the States?

"Mr. Kruttschnitt: Theoretically, it could, but I don't suppose the Federal government would be very familiar with the facts, we will say, at Fair Oaks station, in California . . . It seems to me I can answer your question best by comparing the condition of the carriers to a man who, perhaps, has a very severe or very bad carbuncle and corns that interfere with his powers of locomotion and sitting down, and might also have a small pimple on his cheek. It would interest him more to get rid of the carbuncle and corns and let the pimple take care of itself. In other words, he can stand it. The carriers, if they can have one power to take care of their revenues, which is their life—their 100 per cent—they could very well leave the control of certain of their expenses, amounting to a small fraction of the revenue, in the hands of the States, where it is now . . . I should think then it was entirely within their power (the Congress) and proper that they should say, 'While we have the right to take over everything—rates, taxes, road crossings, and new stations—we do not think, in

the public interest, that it is necessary to do that.' Could they not say, 'We think that these evils, or most of them, can be corrected by our turning over to the National government the power of regulating revenues and of passing on security issues, and fixing rates generally and we leave to the States everything else?'" (pages 977, 978, 980, 981).

In each of the bills leading up to the Transportation Act of 1920 there was a provision for amending Section 13 of the Act by adding language giving the Commission power over intrastate rates in certain circumstances.

In the hearing before the House Committee on Interstate and Foreign Commerce on H. R. 4378—66th Congress, Mr. R. S. Lovett, President of the Southern Pacific Railroad Co., then arguing for an extension of Federal control to State rates, said:

"I do not advocate the abolition of the State commissions. There are many important functions for them to perform . . . the ordinary police power of the States with respect to railroads, not involved in the matter of rates and through service, could be left to them . . ." (p. 1313).

At the same hearing, Mr. Alfred P. Thom, General Counsel of the Railway Executives Advisory Committee testified with regard to the proposed Section 13 in H. R. 4378:

"Mr. Thom: . . . it is essential that you do confine what you propose to a supervision of the discriminatory character of rates, but that you should also extend it so as to provide for the case of undue inequality of rates, . . .

"Mr. Hamilton: You propose practically to do away with the functions of the State commission, except as to the exercise of the police power.

"Mr. Thom: Only as to rates . . ." (pp. 2996-2997).

The whole legislative history of the Transportation Act of 1920, while preempting the field as to intrastate rates under certain circumstances, clearly shows the intent of Congress to leave matters of railroad service to local state regulation.

This situation remained unchanged for 38 years, until the enactment by Congress of the Transportation Act of 1958. Here again it is evident that Congress knowingly and willingly left the regulation of station agencies to the state commissions.

The Transportation Act of 1958 added a new section 13a to the Interstate Commerce Act empowering the Interstate Commerce Commission with certain jurisdiction over discontinuance of passenger trains and ferries. The final enactment did not however grant the ICC any jurisdiction over "station, depot or other facility" which had been the language contained in the legislation as introduced.

From January to April, 1958, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce held a series of hearings on "Problems of the Railroads." One of the state regulatory commission witnesses at these hearings was Commissioner Alan S. Boyd of the Florida Railroad and Public Utilities Commission, who presented for the record statistical summaries on passenger train discontinuances and on station agency discontinuances approved or denied by state commissions.

for 1951-56 (pp. 221-224). The latter summary showed that in the period 1951-56 inclusive, the state commissions had approved station agency discontinuances in 2466 instances and denied them in 372 instances.

Another state regulatory commission witness was Commissioner John M. Ropes of the Iowa Commerce Commission (pp. 1815-1828). Referring to dualization of station agencies, Commissioner Ropes testified:

"Consolidation of some rail services should be made rather than the discontinuance of such service altogether. The Minneapolis and St. Louis Railway Co. has initiated a program in Iowa and surrounding States providing for dualization of agency service in some of the smaller communities located on its line. Other carriers are doing likewise. Briefly, this program provides for 1 man handling the railroad business of 2 or more small communities. Where the program has been inaugurated with the authority of the State commission the people of those communities have been satisfied with the service, and the railroads have made a substantial savings."

...
"For example, the Minneapolis & St. Louis Railway Co., and the Chicago-Northwestern Railway Co. has located in the Midwest, and I imagine surrounding areas, programs to dualize agency service.

"Briefly, this program is one where 1 agent handles the railroad business at 2 or more small communities. We have found where the program has been inaugurated with the permission of the State commission, the people of the communities have been satisfied with the service and the railroads have made substantial savings."

Another witness who opposed any transfer of state commission jurisdiction over station agencies to the Interstate Commerce Commission was Mr. G. E. Leighty, Chairman of the Railway Labor Executives' Association (pp. 1985-2038). Mr. Leighty testified:

"The railroads have abandoned entirely too many stations and cut out too much service already, for their own good. State commissions have gone too far in authorizing these cuts. Information on the record of the State commissions was submitted in detail in the Interstate Commerce Commission inquiry into the Railroad Passenger Deficit Problem (ICC Docket No. 31954).

"Mr. Walter R. McDonald, Chairman of the Passenger Deficit Committee of the National Association of Railroad and Utilities Commissioners submitted tables summarizing the actions of State commissions on both abandonments and discontinuances for the 6-year period, 1951-56. In that period, railroads throughout the country requested the abandonment of 2,838 stations. State agencies granted 2,466 of these requests—87 percent of the total. In the same period the carriers requested approval to discontinue 1,471 trains. State commissions granted 1,274 of these requests—86.5 percent of the total."

The information to which Mr. Leighty referred in ICC Docket No. 31954 was the same information which had been placed in the record of the Senate hearings by Commissioner Boyd and referred to above. The following exchange of conversation took place between Mr. Leighty and Senator Purtell:

"Senator Purtell: You want it left in these States even though you tell me that some State

agencies have permitted the railroads to do as they will?

"Mr. Leighty: That's right."

Following these hearings, there was introduced in the Senate S. 3778 embracing the recommendations of the Subcommittee on Surface Transportation growing out of testimony received at the hearings. S. 3778 contained the language "station, depot or other facility" as being among the matters which would be transferred from State to Federal jurisdiction.

During the debate on the floor of the Senate, Senator Neuberger offered an amendment to this portion of the bill (Cong. Rec. p. 10864) :

"My amendment would amend lines 6, 14 and 20 on page 6, in section 4 by inserting the word 'or' between the words 'train' and 'ferry' and striking the words 'station, depot or other facility'.

"The essential purpose of the amendment is to leave these particular items under State jurisdiction, as they are at present."

Senator Smathers, sponsor of S. 3778, indicated acceptance of this amendment with the understanding that it would be perfected in conference. The Senate agreed to the Neuberger amendment (Cong. Rec. p. 10864).

In the House of Representatives a companion bill to S. 3778 was introduced, namely H. R. 12832. This bill included the same language as S. 3778 regarding "station, depot or other facility," but the House Committee on Interstate and Foreign Commerce, in reporting the bill, deleted this language. The Committee stated:

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." (H. Rept. No. 1922, p. 12)

In the course of the debate on the floor of the House, Congressman Harris, sponsor of H. R. 12832, stated:

"The abandonment of stations and depots is left with State Commissions. So you can see that practically all of this problem of abandonment is continued with the State Commission, as it has been in the past. The Congress has never preempted that authority." (Cong. Rec., p. 12530)

H. R. 12832 passed the House in the form recommended by the Committee, without the language "station, depot or other facility."

S. 3778 and H. R. 12832 went to conference and the conference committee accepted the House version of the bill on this question. All reference to "station, depot or other facility" was deleted from the conference-reported bill. The conference report passed both the Senate and the House and became Public Law 85-625, known as the Transportation Act of 1958.

This study of the legislative history clearly indicates that Congress has carefully considered the matter of state jurisdiction over station agencies and has knowingly and willingly left jurisdiction over such facilities with the state regulatory commissions.

The question then is not one of a conflict between a federal statute (the Railway Labor Act) and the action

of a state commission but rather of interpreting the intent of Congress in its conscious choice of authorizing both actions. The answer should be to achieve a compatible interpretation of both expressions of Congress so as not to force an irreconcilable conflict. If the term "working conditions" in the Railway Labor Act is held to embrace such subjects of agreement as are within the volition of either party, and not to include matters of statutory duty, then such an end can be accomplished.

CONCLUSION

This Association does not believe that Congress intended that orders of a state regulatory commission concerning station agencies could be thwarted by private contractual agreements under the Railway Labor Act. Accordingly, we urge that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

AUSTIN L. ROBERTS, JR.
Attorney for said Association
5310 I.C.C. Building
P. O. Box 684
Washington 4, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

THE ORDER OF RAILROAD TELEGRAPHERS, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF BUREAU OF INFORMATION OF EASTERN RAIL-
WAYS, THE ASSOCIATION OF WESTERN RAILWAYS,
AND BUREAU OF INFORMATION OF SOUTHEASTERN
RAILWAYS AS AMICI CURIAE

HOWARD NEITZERT,
WALTER J. CUMMINGS, JR.,
WILLIAM M. McGOVERN, JR.,
11 South La Salle Street,
Chicago 3, Illinois

Attorneys for Bureau of Information of Eastern Railways, The Association of Western Railways, and Bureau of Information of Southeastern Railways.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel

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**BRIEF OF BUREAU OF INFORMATION OF EASTERN RAIL-
WAYS, THE ASSOCIATION OF WESTERN RAILWAYS,
AND BUREAU OF INFORMATION OF SOUTHEASTERN
RAILWAYS AS AMICI CURIAE**

The Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways submit this brief as *amici curiae* in support of the position of the respondent that the judgment of the court of appeals be affirmed. The consent of the attorneys for both the petitioners and the respondent has been obtained and is submitted herewith in accordance with Rule 42 of the Rules of this Court.

The Interest of *Amici Curiae*

Amici curiae are the Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways, unincorporated associations of the majority of the carriers by railroad that employ persons defined as "employees" in Section 1 Fifth of the Railway Labor Act (45 USC § 151. Fifth.) The members of these associations are subject to the Railway Labor Act, for each of these railroads is a "carrier" within the meaning of Section 1 First of the Railway Labor Act (45 USC § 151 First).

The railroads here represented by *amici curiae* are constantly involved in labor negotiations, so that the instant case is of special significance to them. Although the facts in this case may make a broad decision unnecessary, *amici curiae* feel that the Court should be apprised of the effect its decision could have in the entire field of railroad labor relations.

Amici curiae believe that the petitioners' demand, which would give Telegraphers a veto right over the abolition and consolidation of station agencies, is not a subject of compulsory bargaining under the Railway Labor Act, but is rather a subject to be regulated in the public interest. If the decision below is reversed, similar demands by petitioner and other labor organizations on railroads represented by *amici curiae* would serve to prevent the modernization of all railroads and the abandonment of wasteful operations with the approval of state and federal regulatory agencies pursuant to the National Transportation Policy embodied in the Interstate Commerce Act.

It is important to the railroads and the general public that the Railway Labor Act be enforced and that the costly strikes which that Act is designed to prevent be avoided.

If the decision below is reversed, the employees of the railroads will be encouraged to conduct strikes to enforce non-bargainable demands in the future, secure in the knowledge that the strikes will be financed out of the Railroad Unemployment Insurance Account established by the Railroad Unemployment Insurance Act (45 USC § 351 *et seq.*). Unlike other industries, railroad employees on strike are eligible for unemployment compensation unless the strike was called in violation of the Railway Labor Act. The obvious advantage in bargaining power which this gives to railroad labor organizations makes the scope of required collective bargaining under the Railway Labor Act a matter of concern to all carriers. Moreover, since the railroads are subject to the taxes which finance the insurance under the Railroad Unemployment Insurance Act, they would be financially affected by any depletion of the Railroad Unemployment Insurance Account.

Questions Presented

1. Is a railroad labor organization's demand for a veto over the abolition of positions a required subject of bargaining under the Railway Labor Act where the demand is designed to frustrate a plan for coordinating station agencies which has been approved by state regulatory commissions?
2. Is a strike called for the sole purpose of enforcing a demand that is nonbargainable under the Railway Labor Act protected by the Norris-La Guardia Act?

Certain other questions have been raised by petitioners in their brief, such as the right of a union to strike during mediation and for thirty days thereafter, and the propriety of an injunction pending appeal in a case in which the applicability of the Norris-La Guardia Act is disputed. Although *amici curiae* do not believe these questions are

4

appropriately presented in this case, some of them are discussed briefly herein. See pp. 50-55 *infra*.

Summary of Argument

I

Petitioners' demand for a veto over the abolition of positions is not a subject for mandatory collective bargaining under the Railway Labor Act. Modern labor management relations contemplate two major areas of decision which are not governed by collective bargaining. One area relates to internal relations of employees and their representatives. Contract proposals by which employers seek to have a voice in this area have been held to be beyond the scope of mandatory collective bargaining. On the other hand, an area in which management has a right of decision subject to public regulation but unhindered by collective bargaining is equally well recognized, even by spokesmen of organized labor.

A. The duty imposed on employers and employees to bargain under the Railway Labor Act is not unlimited. Required subjects of bargaining are those that relate to "rates of pay, rules, and working conditions." Petitioners' argument that any contract proposal must be bargained about is unsupported by the legislative history of the Railway Labor Act and would render meaningless the frequent references in the Act to "rates of pay, rules, and working conditions." Petitioners' contention is also contrary to the General Purposes of the Act stated in Section 2. 45 USC § 151a. The failure of Congress to create an administrative agency like the National Labor Relations Board to enforce the duty to bargain collectively under the Railway Labor Act does not mean that that duty is unenforceable or indefinable. The federal courts can and have enforced and defined that duty, without being unduly bur-

dened by litigation. Federal courts have frequently recognized that carriers are free to make certain decisions unrelated to rates of pay, rules, and working conditions without bargaining for the consent of labor organizations.

B. The petitioners' demand would force respondent to violate the national transportation policy which seeks to avoid waste and to promote efficiency in transportation. The legislative history of the Transportation Act of 1940 reveals that Congress wished to promote efficiency by encouraging consolidations even though employees were displaced thereby, provided that displaced employees were given some fair protection. The present case involves a consolidation of station agencies. Control over abandonment or consolidation of stations pursuant to this national policy of avoiding waste was specifically left by Congress with the states when it considered the Transportation Act of 1958. Respondent's plan for consolidating station agencies was approved by state regulatory commissions after hearings in which petitioners were allowed to present objections. These commissions found that there was a negligible amount of work at the individual stations respondent proposed to combine and therefore the maintenance of full time agency service at these stations would dissipate respondent's revenues and impair its capacity to render adequate service to the public.

Petitioners' demand is therefore like an attempt by a labor organization to compel a carrier to violate a national policy against discrimination in employment. Such a demand does not come within the realm of legitimate collective bargaining. A demand may be nonbargainable for this reason even though agreement to such a demand by the other party would not be illegal.

C. The abandonment of station agencies has historically been a matter for state regulation and not a subject for collective bargaining. The contracts cited by petitioners as precedent are different in purpose and effect from the proposal at issue. Petitioners' attempt to obtain a veto over the abolition of positions is quite different from contracts calling for consultations between management and labor prior to changes in operations. The veto is unqualified and could be used to prevent the abolition of a position even though it was proved that the position was unneeded and business conditions required its elimination.

The veto has nothing to do with various means whereby unions are given a voice in the distribution of existing job opportunities. Such provisions as those relating to seniority or work-sharing assume a right in management to decide what jobs are necessary because those provisions only govern the question who are to fill such jobs. Guaranteed annual wage agreements to promote stable employment in industries with seasonal fluctuations in employment do not prevent the abolition of permanently unneeded jobs, and are also unlike petitioners' proposal.

Severance pay for employees permanently displaced by operational and technological changes is concededly bargainable and has been offered to petitioners by respondent. Respondent has also offered to negotiate an agreement limiting lay-offs of employees. Such measures relate to the impact of changes on employees, either by cushioning the impact or by preventing displacement of present employees. They do not prevent normal attrition in unneeded jobs. Petitioners' demand, however, does not concern the effect of changes on employees. The veto which they seek could prevent the abolition of a position even though no employee

was affected thereby, either because the present holder of the position had retired or quit or was transferred to a newly created job.

Even if there were historical precedent for a proposal like petitioners', it would not necessarily be bargainable unless it fell within the statutory definition and did not violate national policies.

II

Petitioners' strike was called for the sole purpose of compelling respondent to submit to a demand beyond the scope of mandatory bargaining under the Railway Labor Act. Therefore the strike is not protected by the Norris-LaGuardia Act, which must be accommodated to the purposes of the Railway Labor Act. Petitioners' strike to obtain a nonbargainable demand was accompanied by a refusal to discuss any of the alternatives for protecting employees which were suggested as subjects for negotiation by respondent. Such insistence on a nonbargainable proposal constitutes a refusal to bargain. The Railway Labor Act imposes the duty on both carriers and employees to bargain over rates of pay, rules, and working conditions and violation of this duty is subject to injunction. Just as an employer may be ordered to stop insisting on a nonbargainable proposal as a condition to entering a contract, a union may be required to forego resort to a strike to compel submission to a nonbargainable demand.

The decision below does not restrict the legitimate interests of labor. In disputes such as the present one which involve initial management decisions subject to public regulation, reasonable alternatives to a strike are available to protect employees. Labor organizations can and in the present case petitioners did appear before the appropriate regulatory agencies to oppose changes for which carriers

are seeking approval. If, after considering the interests of employees, an administrative tribunal approves a change, labor organizations may also bargain over ways to curtail adverse effects on employees. Respondent has offered to discuss such matters as severance pay and even a limitation on lay-offs of employees.

III

Any issue as to the right to strike for 30 days after the National Mediation Board has terminated its services has become moot in this case. However, petitioners' argument that the prohibitions of Sections 5 First and 6 of the Railway Labor Act apply only to carriers must be answered. The legislative history of the Railway Labor Act and the consistent practice thereunder demonstrate that strikes pending mediation were banned. The National Mediation Board so recognizes. Judicial decisions have also uniformly held that strikes over major disputes may not be commenced until the procedures of the Railway Labor Act have been exhausted.

IV

The propriety of the injunction pending appeal need not be decided. In any event, when the applicability of the Norris-La Guardia Act is seriously disputed, a district court has power to enjoin a strike pending a final decision on the question of its jurisdiction.

I. THE PETITIONERS' DEMAND IS OUTSIDE THE SCOPE OF MANDATORY COLLECTIVE BARGAINING UNDER THE RAILWAY LABOR ACT.

Purporting to follow the procedural requirements of

Section 6 of the Railway Labor Act (45 USC § 156) for the service of notice of "an intended change in agreements affecting rates of pay, rules, or working conditions," on December 23, 1957, the Order of Railroad Telegraphers (Telegraphers) served upon the Chicago and North Western Railway Company (North Western), notice of their desire to add the following to the agreement between the parties:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization."

This demand presents the issue whether an unqualified veto power over the abolition of positions on the North Western is a bargainable matter under the Railway Labor Act.

Amici curiae insist that the Telegraphers' demand does not come within the scope of mandatory collective bargaining under the Railway Labor Act. It is comparable rather to a request for prior approval from a labor organization before a particular train or branch line can be discontinued or a railroad yard closed. The duty imposed on employers and employees to bargain collectively under the National Labor Relations Act and the Railway Labor Act contemplates a division of modern labor-management relations into three major areas of decision. *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F.2d 34 (C.A. 4, 1957), certiorari denied, 355 U.S. 914. In one area, management has "the right and the power to make certain decisions without prior consultation with the representatives of the employees and to effectuate them in practice without the delay inherent in extended collective bargaining procedures." 248 F. 2d at p. 41. In a second area are those decisions properly made by joint agreement

between management and labor—decisions on “wages, hours of employment, seniority rights, grievance procedures, and similar matters.” 248 F. 2d at p. 42. In a third area are decisions “made solely by the representatives of the employees or the membership of the organization, which, like the decisions of management in the first area, are not the proper business of the other party. *Idem.* Labor is thus protected in the administration of affairs that are properly its sole concern.

This Court recently emphasized this protected area of labor relations in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342. In that case an employer insisted on a “ballot” clause requiring a secret vote of the employees before a strike could be called. In discussing the duty of employers and employees under the Taft-Hartley Act to bargain over “wages, hours and other terms and conditions of employment,” the Court stated that:

“The duty is limited to those subjects. . . . As to other matters, however, each party is free to bargain or not to bargain. . . .

“Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether either the ‘ballot’ or the ‘recognition’ clause is a subject within the phrase ‘wages, hours, and other terms and conditions of employment’ which defines mandatory bargaining. The ‘ballot’ clause is not within that definition. It relates only to the procedure to be followed by the employees among themselves. . . .” 356 U.S. at pp. 349-350.

Unlike a no-strike agreement, which is bargainable because it “regulates the relations between the employer and the employees, . . . the ‘ballot’ clause . . . deals only with relations between the employees and their union.” 356 U.S. at p. 350.

Likewise in *Iron Castings, Inc.*, 114 NLRB 739, enforced, 237 F. 2d 344 (C.A. 5, 1956), a company's proposed clause governing the composition of the employees' grievance committee was held to be nonbargainable. "Respondent's insistence on the imposition of its ideas as to the composition and method of choosing the employees' shop committee was an attempt to participate in a right reserved exclusively to its employees under the Act." 114 NLRB at p. 744. Similarly in *National Labor Relations Board v. Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5, 1951), a request that a union register under a state law so as to be amenable to suit was held to be "outside the area of compulsory bargaining." And in *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85 (C.A. 4, 1956), it was held that an employer was not entitled to insist that the collective bargaining contract, when executed, must be ratified by a secret vote of all the employees represented by the union, even though such a provision if agreed to by the parties would be valid. Accord, *National Labor Relations Board v. Corsicana Cotton Mills*, 178 F. 2d 344 (C.A. 5, 1949).

Conversely, certain decisions relating to the conduct of the business are a function of management, subject to the rights of the general public in regulated industries such as transportation. With reference to decisions in the management areas, the court in the *Norfolk & Portsmouth* case said (248 F. 2d at pp. 41):

"Among the decisions generally regarded as falling within this class are the type of product to be produced, the location of plants, the installation of new machinery and equipment and similar matters. All of such decisions when effectuated have a resultant effect upon working conditions and are of interest to employees and their representatives. They are none the less re-

garded as being within the prerogative of management alone to decide and effectuate in the first instance."

The court stated the reasons why certain decisions must be made by management alone (248 F. 2d at p. 42.):

"The generally recognized differences in the nature of the several classes of decision and the appropriate means of effectuating each are founded upon important considerations. The installation of new machinery, for instance, is a decision which management should be more qualified to make than the representatives of employees. The making of the decision and its effectuation, without delay, may be imperative if competitive conditions are to be met and the interest of both employer and employees are to be served in the long run."

The area reserved for unilateral management decisions has also been recognized by the representatives of organized labor. Arthur J. Goldberg, General Counsel for the United Steel Workers, at the Ninth Annual Meeting of the National Academy of Arbitrators, stated:

"Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has the right to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have that improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute." *Management Rights and the Arbitration Process* (1956) p. 123.

Decisions of the War Labor Board on the function of management rights under collective bargaining are persuasive, since they reflect the accumulated experience of the expert representatives of management, labor and general public during the years 1942-1945. See Teller, *Management Functions under Collective Bargaining* (1947) p. 28. In *Federal Shipbuilding & Drydock Co.*, 21 War Lab. Rep. 121 (1945), the Board rejected the union's request for a rule:

"... That any substantial reduction in number of employees on a shift cannot be effectuated except by mutual agreement. This has been denied for the fairly obvious reason that we believe it is still a management prerogative to determine the size of its work force and to determine whether a particular type of shift operation is necessary. There can be no doubt that good labor relations require discussion with the union when any major change in number of shifts or employment on a particular shift is in prospect. However, to make any such change contingent on mutual agreement is another matter."

See also *John F. Trommer, Inc.*, 23 War Lab. Rep. 117 (1945); *New York, New Jersey Milk Distributors*, 27 War Lab. Rep. 66, 72-73 (1945).

These considerations have been reflected in federal labor legislation defining the duty of labor and management to bargain collectively. Under the Taft-Hartley Act employers and employees must bargain "with respect to wages, hours, and other terms and conditions of employment." 29 USC § 158 (d). As we have seen, employees have no duty to bargain collectively over management proposals that relate to internal affairs of the union. Similarly, the duty of employers to bargain collectively is not unlimited. Among the demands of unions which have been held to be outside the scope of collective bargaining, are the rentals charged

for company housing, *National Labor Relations Board v. Bemis Bros. Bag Co.*, 206 F. 2d 33 (C.A. 5, 1953); general legislative policies (advocacy of child labor law), *Globe Cotton Mills v. National Labor Relations Board*, 103 F. 2d 91 (C.A. 5, 1939); disciplinary measures applied to strikers engaged in misconduct, *National Carbon Division*, 100 NLRB 689, 694 (1952); and the employment terms offered to replacements for union members on strike, *Times Publishing Co.*, 72 NLRB 676, 684 (1947).

An employer under the Taft-Hartley Act need not consult with the union over decisions relating to the operation of his business. In *Krantz Wire & Manufacturing Co.*, 97 NLRB 971, 988 (1952), an employer was held to be entitled to close his plant and discharge his employees for business reasons without any prior consultation with the union.

"The complaint alleges, as one of the grounds of the refusal to bargain, the closing of the plant by Krantz on or about July 21, 1950, 'without notifying or consulting the Union.' It has already been found that Krantz closed his plant and discharged his employees because of a bona fide transfer of his plant and equipment, and not as part of any scheme for evading his obligation to bargain with the Union. An employer is free to close his plant and discharge his employees for any reason or for no reason at all, provided only that he does not do so with the purpose of discouraging or encouraging union membership, or otherwise interfering with the exercise by his employees of the rights guaranteed in Section 7 of the Act. Where he closes his plant for legitimate business reasons the Act does not require that he consult with his employees' representatives as a prerequisite to going out of business."

Accord: *Walter Holm & Co.*, 87 NLRB 1168, 1172 (1949). An employer is also free to move his operations to a new location without bargaining for the consent of the union.

Auto Stove Works, 81 NLRB 1203 (1949); *Mount Hope Finishing Co. v. National Labor Relations Board*, 211 F. 2d 365, 374 (C.A. 4, 1954).

In *Penello v. International Union, UMW*, 88 F. Supp. 935, 940-943 (D.D.C., 1950), a union proposal for a contract clause which would effectually give the union the power to control production and prices was held to be beyond the scope of collective bargaining.

A. The Duty to Bargain Collectively under the Railway Labor Act Is Not Unlimited.

The duty of railroads and their employees to bargain collectively under Section 2 First (45 USC § 152 First) of the Railway Labor Act is also limited in scope. Carriers and employees are required to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions * * *."

Petitioners seem to think that the words "rates of pay, rules, and working conditions" in the Railway Labor Act, (see §§ 2, 2 First, 2 Sixth, 2 Seventh, 3 First (i), 5 First, 5 Third (e), and 6) are just excess verbiage because they claim carriers and unions have a duty to bargain over "all disputes" whether or not they relate to rates of pay, rules, or working conditions. Petitioners' desire to avoid having to show that their proposal has anything to do with working conditions is certainly understandable. But the argument that there is no limit to the subjects of collective bargaining under the Railway Labor Act is fallacious.

As the brief of the Railway Labor Executives' Association (RLEA) points out (Br. 21), the "all disputes" language in Sections 2 First and Second of the present Railway Labor Act was derived from Section 301 of the Transportation Act of 1920 which stated that "all disputes"

between carriers and employees were first to be considered in conference. The last sentence of this Section stated that "If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." 41 Stat. 469. Therefore the disputes to which Section 301 refers are the different kinds of disputes coming within the jurisdiction of the various boards set up by the 1920 Act. The "all disputes" language means only that regardless of the kind of dispute, it shall be considered in conference prior to invoking the appropriate board for the particular type of dispute.

Section 302 provided for railroad boards of labor adjustment, set up by agreement, which were to "decide any dispute involving only grievances, rules or working conditions" not decided in conference. 41 Stat. 469-470. The Railroad Labor Board, a body appointed by the President, was given jurisdiction in Section 307 over "all disputes with respect to wages or salaries of employees" not decided in conference. 41 Stat. 470-471. We thus have in the 1920 Act the first distinction between major and minor disputes, with different procedures for handling each after the initial stage of negotiation. The last sentence of Section 301 *supra* states that all disputes not resolved in conference must be handled by the procedures set up in the Act. No procedure was formulated for a "dispute" having nothing to do with "wages or salaries" or "grievances, rules or working conditions." Section 301 therefore contemplated that all disputes would fall into one of these two categories. In the same way, when the idea behind Section 301 was carried over into Section 2 of the Railway Labor Act of 1926, the

intent was that "all disputes" (a shorthand way of covering both major and minor disputes) should be considered in conference before the Mediation Board or the Adjustment Board began to operate. The intent was not that carriers had to bargain over anything under the sun, including the employment of Negroes, the closing of a yard, or of a station. If that were the purpose of the language chosen, the repeated references to "rates of pay, rules, and working conditions" in the Act would be redundant.

The RLEA also relies on a reference to three classes of disputes in the House Report on the Railway Labor Act of 1926 (Br. 25) and in Section 5 First of the 1926 Act (Br. 24) which was changed in 1934. These catch-all references to "other disputes" were explained in the hearings before the House Interstate Commerce Committee by one of the principal draftsmen of the 1926 Act. The reference was intended to cover certain peculiar disputes not falling within the statutory description of either a major or a minor dispute. "Then we wanted to make it clear that there were other kinds of disagreements, such as, for example, a disagreement over the establishment of an adjustment board, a disagreement over the original agreement before any agreement was made, a disagreement over the original representation. All those types of disputes are not specifically covered in A and B, and so to have a catchall we put in C any other disputes." Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180, 69th Cong., 1st Sess., p. 71 (1926).

The present Act no longer outlines three classes of dispute in Section 5 First. It does permit invocation of the services of the Mediation Board in major disputes and "any other dispute not referable to the National Railroad Adjustment Board." 45 USC § 155 First (b). This language expands the field in which the Mediation Board

may operate but does not support petitioners' contention that the duty of collective bargaining imposed on carriers and employees is unlimited. Sometimes a question may arise as to whether a dispute is a major or a minor one, i.e., whether a party is proposing to change an agreement or is objecting to action by the other party on the ground it violates an existing agreement. Action by the Mediation Board might be appropriate in that situation because it will serve to discover the positions of both sides and thus clarify the issue. Cf. *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C.A. 4, 1957), certiorari denied, 35 U.S. 914. Similarly in the present case where the bargainability of petitioners' proposal was questioned, the Mediation Board helped to clarify the nature of this dispute. Respondent made clear its position on bargainability and suggested alternatives for negotiations on bargainable matters (R. 158). Thus the broad language of Section 5 First (b) permits invocation of the Mediation Board in situations where the nature of the dispute is not yet clearly defined. This language is consistent with the Act's express limitation of mandatory bargaining by the parties to agreements concerning "rates of pay, rules, or working conditions." The issue in this case is not the propriety of the action by the Mediation Board, but rather the duty of respondent to bargain over a proposal outside the realm of mandatory bargaining.

The RLEA suggests that the duty to bargain is unlimited under the Railway Labor Act, unlike the Labor-Management Relations Act, because Congress felt a need to avoid interruptions in transportation (Br. 19). The unstated premise in this argument is that by permitting management to interfere in the internal affairs of unions and vice versa and thereby expanding the areas of possible dispute, peaceful labor relations will be promoted. From this unsound pre-

mise the illogical result would follow that by reversing the decision below and permitting the strike Congress' policy of avoiding strikes will best be fulfilled! The General Purposes of the Railway Labor Act are set out in Section 2. They are, *inter alia*: (1) "to avoid any interruption to commerce or to the operation of any carrier," (4) "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions" and (5) "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 USC § 151a. The settlement of a dispute unrelated to grievances, rates of pay, rules or working conditions is therefore outside the purposes of the Railway Labor Act, but if such a dispute is allowed to interrupt commerce, the first purpose of the Act would be frustrated. Therefore, the decision below fully promotes all the policies of the Act.

Petitioners argue that the limits on the scope of mandatory collective bargaining set by this Court in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, are inapplicable here because "the term 'unfair labor practice' is not used in the Railway Labor Act" and the Act "establishes no such agency as the National Labor Relations Board empowered to determine what constitutes an unfair labor practice" (Br. 36). But though Congress did not call a refusal to bargain an unfair labor practice and did not set up an agency to decide what constitutes a refusal to bargain under the Railway Labor Act, the Railway Labor Act does create a duty to bargain on certain subjects and that duty is judicially enforceable. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515; *Brotherhood of Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F. 2d 36 (C.A. 4, 1953). The power to enforce the duty to bargain

must include the power to determine whether the duty has been violated, and the determination of this question can and has been made by federal courts. See cases cited pp. 22-24 *infra*. The lack of an administrative remedy to enforce rights under the Railway Labor Act does not mean these rights must be obliterated, but rather that they shall be judicially enforced. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774.

Petitioners argue that the determination of questions of bargainability under the Railway Labor Act would impose a heavy burden on federal courts (Pet. App. 55) because "railroad management has apparently adopted a widespread policy of raising the question of bargainability" (Pet. App. 53-54). Instances in which carriers have supposedly raised the issue are cited in an appendix to the "appendix" (pp. 57-63) in a misleading fashion, for a single notice is listed as many as nine times (pp. 58-59) in order to make these examples appear more numerous than they are.¹ There is no indication that in any of these instances (shown at pp. 57-63) the matter culminated in litigation, and thus it is difficult to see how any great burden is imposed on the federal courts. In contrast to petitioners' action in the present case, railroad labor organizations do not generally resort to strikes whenever the question of bargainability is raised. Typically, discussion on alternatives proposed by the party raising the question of bargainability leads to agreements without litigation or interruption to commerce. Moreover, the fact that courts may on occasion become involved in questions of the scope of mandatory bargaining is no reason for not enforcing the Railway Labor Act the way it was written. Despite the

1. Petitioners' description of many of the proposals to which carriers have objected is also misleading, but since none of these proposals is in issue in the present cases, it would serve no useful purpose to discuss them further herein.

existence of the National Labor Relations Board, federal courts have frequently been called upon to decide the bargainability of a proposal under the National Labor Relations Act. See, e.g., *National Labor Relations Board v. Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5, 1951); *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85 (C.A. 4, 1956); *National Labor Relations Board v. Corsicana Cotton Mills*, 178 F. 2d 344 (C.A. 5, 1949); *Globe Cotton Mills v. National Labor Relations Board*, 103 F. 2d 91 (C.A. 5, 1939); *Penello v. International Union, UMW*, 88 F. Supp. 935 (D.D.C., 1950). This "burden" on courts has not persuaded this Court to construe the National Labor Relations Act to make the scope of collective bargaining unlimited. *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342.

Far from being unlimited, the duty of railroads under the Railway Labor Act to bargain over "rates of pay, rules, and working conditions" has been held to be narrower in compass than the formula of "wages, hours, and other terms and conditions of employment" used in the National Labor Relations Act. See *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 255 (C.A. 7, 1948), certiorari denied, 336 U.S. 960; *Weyerhaeuser Timber Co.*, 87 NLRB 672, 673, note 1 (1949). The significance in the distinctive terminology of the Railway Labor Act was noted by Senator Wagner in a debate over a proposal to use the term "working conditions" in the Taft-Hartley Act. He stated (93 Cong. Rec. 3323):

"By substituting the narrower term 'working conditions' [found in the Railway Labor Act] for the present broader term 'conditions of employment' [found in the old Wagner Act], the bill would narrow the scope of collective bargaining to exclude many subjects such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee rela-

tionship, and in regard to which the employer should not have the power of industrial absolutism.”

Courts have frequently recognized that the limited statutory duty to bargain in the Railway Labor Act leaves an area in which management is free to make decisions without consulting or obtaining the consent of the representatives of employees. In *In re Chicago North Shore & Milwaukee R. Co.*, 147 F. 2d 723 (C.A. 7, 1945), certiorari denied, 325 U.S. 852, the North Shore railroad agreed with the Chicago Rapid Transit lines that North Shore trains, while operating on Rapid Transit property in Chicago, should be manned by Rapid Transit Personnel. The new arrangement resulted in less work for North Shore employees, who had formerly operated the trains in Chicago as well as north of Chicago. Nevertheless, the Court held that the railroad did not have to give notice of the change and negotiate about it with the union under Section 6 of the Railway Labor Act (45 USC § 156). This “change in the intercorporate operating arrangements” of the two carriers was not a change in “working conditions” requiring prior consultation with the North Shore employees.

In *Robertson v. Atlantic Coast Line R. Co.*, 18 CCH Labor Cases, Par. 65,693 (D.D.C., 1950), the defendant railroad changed its home terminal from New York to Miami without consulting the union. Since the long stopovers for employees on the New York to Miami run were thus shifted to the latter city, the change affected workers who had established homes in New York. Nevertheless the court held the change was not one in “working conditions” requiring negotiation with the union under the Railway Labor Act. The court stated that “the location and relocation of home terminals, as well as operational

changes in schedules, seem clearly to be matters within the right of management."

In *Beeler v. Chicago, R. I. & P. Ry. Co.*, 169 F. 2d 557 (C.A. 10, 1948), an employe insisted that notice under Section 6 of the Railway Labor Act had to be served before the railroad could abolish a certain position. In rejecting this contention the court stated (p. 560):

"The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process. *Texas & N.O.R.Co v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; *Virginia R. Co., v. System Federation*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789. Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352 . . . It is suggested that Section 6 of the Railway Labor Act requires such notice, but that Section providing for a thirty day written notice by carriers and representatives of an intended change in agreements affecting rates of pay, rules, or working conditions, obviously has reference to matters affecting the collective bargaining process, and does not relate to matters lying outside of its scope." (Emphasis supplied)

In *New York Central R. Co. v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273 (N.D. Ohio, 1956), a strike against the closing of a yard which necessitated the lay-off of employees was enjoined. The district court held that the objection to the closing of the yard was not within the scope of mandatory collective bargaining under the Railway Labor Act and not a demand for a term or condition of employment within the meaning of the Norris-La Guardia Act. The court distinguished between the initial management decision, which was not a proper subject of collective bargaining, and the employment consequences thereof, which in that case, as here, the management was

willing to bargain about (140 F. Supp. at pp. 279-280). If the interests of the employees should require attention as a result of management action, the district court felt that then under the terms of the Railway Labor Act the parties would be required to negotiate, not with regard to the merits of the management action, but with the employment consequences thereof (140 F. Supp. at pp. 281-283). The district court stated (140 F. Supp. at pp. 279-280):

"We are of the opinion that the proposed closing of the Yard is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such a step advisable. We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its roundhouses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system."

A permanent injunction against the strike was affirmed by the court of appeals, 246 F. 2d (C.A. 6 (1957)), and this Court denied certiorari, 355 U.S. 877. In affirming, the court of appeals agreed that the union's strike against the management's decision to close the yard did not constitute a labor dispute within the meaning of either the Railway Labor or the Norris-La Guardia Acts. Therefore the railroad was under no obligation to settle or to submit to arbitration the union's protest, and the strike was enjoined to prevent interference with the railroad's duty to furnish transportation to the public.

B. Petitioners' Demand Violates the National Transportation Policy and Concerns a Matter Left by Congress to State Regulation Under That Policy.

In determining the scope of collective bargaining in railroad labor relations, it must be remembered that generally the management decisions outside the realm of bargaining are affected with a public interest and are subject to regulation. This factor is particularly important in the present case. The demand of the Telegraphers will operate as a barrier to fulfillment of the public duty placed on the respondent by the national transportation policy to provide economical and efficient transportation service to the public. Congress has left the implementation of this policy in regard to the operation of station agencies to regulation by the states. Petitioners' insistence that the consolidation of station agencies is within the scope of collective bargaining is inconsistent with Congress' decision that this matter should be subject to state regulation pursuant to the national transportation policy.

In *Texas v. United States*, 292 U.S. 522, 530, this Court noted that the Transportation Act of 1920 had "introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service." The Court stated (at pp. 530-533):

"It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public."

The Transportation Act of 1940, amending the Interstate Commerce Act, was designed to promote the same policy. In the 1940 Act the national transportation policy of the Congress was stated as follows (54 Stat. 899):

"It is hereby declared to be the national transporta-

tion policy of the Congress to . . . promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers."

This Court in *Seaboard Railroad Company v. Daniel*, 333 U.S. 118, upheld an Interstate Commerce Commission order exempting a carrier from a state law, compliance with which would entail needless expense. The Court noted that (at pp. 124-125):

"Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind."

Congressional concern with efficient carrier operations was more recently reflected in the report made by the Senate Committee on Interstate and Foreign Commerce on the Transportation Act of 1958, which criticized the railroads for failing to be sufficiently interested in the elimination of wasteful duplication and nonprofitable operations. S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), p. 11.

The Interstate Commerce Act itself provides (49 USCA § 15a (2)) that:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to . . . the need, in the public interest, of adequate and *efficient* railway transportation service at the *lowest cost* consistent with furnishing such service; and to the need of revenues sufficient to enable the carriers, under honest, *economical*, and *efficient* management, to provide such service." (Emphasis added.)

In rate hearings—especially those on general increases or reductions in rates—it is not uncommon for protestants

to challenge the carriers on the question of efficient operations, and the Interstate Commerce Commission takes efficiency of operations into account, either in response to such challenges or on its own motion, in determining whether increases or decreases in rates should be ordered. See *Ex Parte No. 103, Fifteen Per Cent Case, 1931, No. 26000*, 195 ICC 5, 55 (1933); 215 ICC 439, 460-461 (1936), and *Ex Parte No. 168, Increased Freight Rates, 1948, 272 ICC* 695, 705-707 (1948); 276 ICC 9, 24-31 (1949).

In *Great Northern Ry. Co. Discontinuance of Service*, 307 ICC 59, 75 (1959), the Commission said:

"Obviously, it would be contrary to the public interest, and the expressed national transportation policy of the Congress, 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers,' if we were to require continuance of clearly wasteful and uneconomic transportation services merely to preserve jobs for employees."

Thus the national policy of promoting transportation efficiency contemplates the displacement of employees in unproductive jobs. This is clearly revealed in the legislative history of the Transportation Act of 1940. At one point a proposal was made which would have prevented approval by the Interstate Commerce Commission of consolidations of railroad facilities "if such transaction will result in unemployment or displacement of employees." This proposal was rejected by Congress as going "too far" and likely to prevent all unifications. See *Railway Labor Executives Association v. United States*, 339 U.S. 142, 150-151. Instead the Commission was given power to protect employees by ordering "fair and equitable arrangements" to protect displaced employees. Similarly, the petitioners in the present case have gone too far by seeking an absolute veto on the abolition of all positions. The

decision below does not prevent the petitioners from bargaining over equitable arrangements to protect any employees who may be displaced by the abolition of a position.

It is true that the question in the present case does not involve a decision specifically governed by the Interstate Commerce Commission, since the closing of station agencies was left by Congress to state rather than federal regulation. But Congress did intend that this subject should be governed by regulation in the public interest rather than by collective bargaining. The Transportation Act of 1958 reflects Congress' strong concern over the need for the nation's railroads to promote efficiency by abandoning unprofitable and wasteful operations. Under prior law the Interstate Commerce Commission had control only over the abandonment of a line of track. The discontinuance of a train without the abandonment of the line of track over which the train operated was subject to state jurisdiction. Because of delays and refusals by state regulatory commissions to authorize discontinuance of little used services, the Interstate Commerce Act was amended to authorize the Interstate Commerce Commission to permit the discontinuance of a train. At the same time Congress decided to leave control over stations with the states.

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." H.R. Rep. No. 922,

85th Cong., 2d Sess. (1958), 2 U.S. Code and Adm. News 3456, 3468.

Jurisdiction over the discontinuance and operation of stations was thus by Congressional mandate left with state agencies. The activity of State Commissions in this field is extensive. In the period between 1951-1956 these Commissions approved 2,466 railroad station agency discontinuances and denied 372. *Idem* at p. 3477. It was this record which prompted Congress to leave jurisdiction over the discontinuance or change in operation of stations to the states. Petitioners insist that such jurisdiction now be turned over to the Order of Railroad Telegraphers instead!

In *Giboney v. Empire Storage Co.*, 336 U.S. 490, this Court upheld an injunction against picketing by retail ice peddlers to coerce a wholesaler to refrain from selling to nonunion vendors. The Court noted that:

"While the State of Missouri is not a party to this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade in one way: The appellant union members have adopted a program to regulate it another way. . . . We hold that the state's power to govern in this field is paramount, . . ." 336 U.S. at p. 504.

The issue in the present case is whether the States of Iowa and South Dakota or the Order of Railroad Telegraphers has paramount power to regulate the abandonment or consolidation of station agencies. Though Congress has left rates of pay and rules governing working conditions of railroad employees to collective bargaining, the closing of stations has been left by Congress to state regu-

lation. In this area subject to state regulation, collective bargaining is superseded by state power. *Missouri Pac. R. Co. v. Norwood*, 42 F. 2d 765 (statutory three-judge court, W.D. Ark., 1930), affirmed, 283 U.S. 249. Petitioners quote extensively (Br. 52-54) from this Court's opinion in *Teamster's Union v. Oliver*, 358 U.S. 283, which held that state policy cannot limit "the solution that the parties' agreement can provide to the problems of wages and working conditions." 358 U.S. at p. 296. (Emphasis supplied.) But state power is inoperative only as to matters such as wages and working conditions which are within the scope of mandatory bargaining. Under the *Oliver* doctrine, state regulation in such matters is superseded regardless of which side the state regulation favors. Nothing in the *Oliver* opinion indicates that the parties' solution to a problem is paramount only if state law is less favorable to labor unions than the results achieved by bargaining. Therefore, if petitioners are correct that the consolidation of station agencies is within the area of federally required collective bargaining, respondent would have been free to adopt the central agency plan by agreement with petitioners even though the Commissions of South Dakota and Iowa had denied permission. The ultimate outcome of the plan would turn on the results of a strike, rather than on the decision of the state regulatory bodies entrusted by Congress with the governance of this subject. Such a result in a case like the present one ignores the substantial public interest in promoting efficient railroad service. In the converse situation in which a state commission decides that a particular station must be retained in the interests of public convenience and necessity, important public interests would also be subverted if the carriers and the labor organization can agree to abandon the station agency pursuant to a collective bargaining contract governing "rules and working conditions." These public interests should not be subordi-

nated to the limited interest of labor organizations in preserving sinecures for their members, particularly since the interests of labor can be protected by collective bargaining over any consequences to employees of management decisions. To permit the secondary interest of labor in these decisions to outweigh the primary concerns of the general public would be to let the tail wag the dog.

A reversal of the decision below would also have implications beyond the end of state control over the operation of stations. If the operation of a station agency is a "working condition" subject to collective bargaining unregulated in the public interest, it would follow that the abandonment of a train or of a branch line, which would also limit employment opportunities, could be made subject to the veto or approval of labor organizations rather than that of the Interstate Commerce Commission. In oral argument before the court of appeals, petitioners asserted that a veto over the discontinuance of a train was a bargainable matter. R. 384-385. In fact three of the positions abolished by respondent since December 3, 1957 (the date the proposed veto becomes effective) were abolished by reason of line abandonments ordered by the Interstate Commerce Commission. (R. 296). Since labor organizations are governed only by the interests of the employees they represent, the interests of the general public would be sacrificed if control over the elimination of stations, branch lines, and trains is delegated to petitioners. See p. 37 *infra*.

For an example of such disregard of the public interest we need look no farther than the present case. The background of petitioners' demand demonstrates that it was made in an effort to preserve positions which no longer served a useful function. The waste and inefficiency of these positions which petitioners insist must be retained have been shown by the findings of the Commissions of Iowa and

South Dakota. The South Dakota Commission found that the work-load of the station agents involved "varies from 12 minutes per day at Farmer to 2 hours per day at Oida with an average work load of 50 minutes per station at the 69 subject stations." It also found that "the maintenance of full time agency service, because of the lack of public need constitutes mismanagement and a dissipation of carrier's revenues which has and will impair its capacity to render adequate rail service to the public at reasonable rates." (R. 192.) The Iowa State Commerce Commission found the total hours actually worked was 17% of the duty hours of the station agents in Iowa or an average time worked of one hour and 14 minutes per day (R. 227). Not one line of petitioners' brief or "appendix" or the brief of the RLEA disputes these findings or suggests that the positions in question performed any useful function.

Petitioners' demand thus represents the antithesis of the efficient, economical railroad service required by the national transportation policy. This policy would be frustrated if abolition of positions is bargainable under the Railway Labor Act. The Railway Labor Act must be construed with other "equally important Congressional objectives" in mind. Cf. *Southern S. S. Co. v. Labor Board* 316 U.S. 31, 47-48.

In *Austin v. Painters' District Council*, 339 Mich. 462, 64 N.W. 2d 550 (1954), the Supreme Court of one of our leading industrial states held that an employer was not required to bargain over a union's demand to restrict the use of modern labor-saving devices. In the negotiations for new contracts, the painters' union demanded restrictions on pan and pressure rollers, amounting practically to a prohibition of their use. The employers refused and the trial court decreed that restrictions on pan and pressure roller equipment could not be insisted upon. In affirming, the Michigan Supreme Court said (64 N.W. 2d at p. 558):

"In this case and all others of a similar nature, there are three parties involved, namely, the union, the management, and the public, and each have certain rights and responsibilities. All courts agree that the union has a right to strike and to do peaceful picketing when their objective is the accomplishment of a legitimate labor objective. * * * Management also has the right to conduct a legitimate business for profit and to use modern devices in the conducting of such business so long as the devices used are not inimical to the health and welfare of its employees. The public has an economic interest in unemployment growing out of strikes."

The Court held that the test to be applied to the union's demand was whether it had

"any reasonable connection with wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment or for the protection from labor abuses" . . . (*idem* at p. 559)

Since the union's demand was found to be unrelated to health, safety or any other of these matters the Court held it could not be insisted upon.

The demands of a railroad union in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, were subject to injunction because they were designed to compel carriers to discriminate against Negroes in employment, contrary to a national policy against discrimination. The *Howard* case did not involve discrimination by a union against members of a class represented by it, as the RLEA asserts in its brief (Br. 30). The Negroes in that case were in a different class than that represented by the Brotherhood of Railroad Trainmen and were represented by their own union. 343 U.S. at p. 773. The Brotherhood's demand was designed to secure jobs for the employees it represented and was in the interest of all the employees represented

by the Brotherhood, but it was nonetheless subject to injunction. Thus a union's demand may be nonbargainable even though it favors the interests of all members of the class the union represents.

Petitioners seek to limit the *Howard* case by saying that the agreement sought by the union was illegal, and petitioners argue that "either the subject of the proposal is one on which agreement would be unlawful, or it is one with respect to which bargaining is mandatory" (Br. 40). This misconceives the rationale of the *Howard* decision. No statute was said to require a carrier to hire Negroes. The only reason the agreement in the *Howard* case was invalid was because it had been reached as a result of the coercive economic pressures of collective bargaining. As this Court noted, the case involved the loss of jobs by Negroes "under compulsion of a bargaining agreement which, to avoid a strike, the railroad made with an exclusively white man's union." 343 U.S. at p. 769. The Brotherhood had "forced the Frisco to agree to discharge the colored 'train porters'". *Idem* at 770 (Emphasis supplied). Similarly in *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U.S. 823, an injunction was granted against union action designed to take jobs away from employees-at-will represented by another union. Of course the carrier was free to discharge its employees-at-will, but the court held that these employees "were entitled to such employment at the will of the Santa Fe without illegal interference; compulsion and unjustified interference by the Trainmen." 181 F. 2d at p. 534. In the present case, even if it were not strictly illegal for respondent to continue to operate station agencies for which there was no use, such action would have violated a policy against inefficiency and waste in the national transportation system. Under the principles of the *Howard* case, a carrier

should not be forced or compelled to violate national policies in order to avoid a strike. The decision of this Court in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, makes it clear that the limits of mandatory collective bargaining are narrower than the limits to the legality of agreements. Of the two proposed clauses held nonbargainable the Court said that "each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions." 356 U.S. at p. 349. In *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85 (C.A. 4, 1956), an employer's proposal was also held to be legal if agreed to, but not a required subject of bargaining.

C. Petitioners' Demand Has Not Historically Been a Matter for Collective Bargaining.

Petitioners devote a portion of their principal brief and a long "appendix" to show that "stabilization of employment" is a desirable thing and that historically it has been a subject of collective bargaining. But the issue in the present case is not "stabilization of employment" but rather a specific demand made by petitioners which is quite different from anything cited by them as precedent. The main thrust of petitioners' argument is that (1) such matters as seniority and severance pay promote stabilization of employment, (2) carriers have traditionally bargained about seniority and severance pay, etc., (3) "stabilization of employment" is therefore a subject of mandatory bargaining, and (4) a veto over the abolition of positions promotes "stabilization of employment" and is therefore bargainable. The RLEA asserts in its brief that the proposal advanced by petitioners is "no different in substance" from that advanced by the employer in *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374 (C.A.

7, 1954), because the strike clause in the latter case "provides stabilization of employment" for the employer's benefits (Br. 44). However, the *Allis-Chalmers* decision was in effect overruled by this Court in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, which held nonbargainable a pre-strike ballot clause substantially identical to that sought by Allis-Chalmers. The demands of the labor organization in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, were also designed to achieve "stabilization of employment" and yet were not bargainable. Thus applying petitioners' "logic", (1) strike ballot and racially discriminatory clauses relate to "stabilization of employment," (2) they are nonbargainable, (3) therefore "stabilization of employment" is not a required subject of bargaining, and (4) therefore employers need not discuss seniority, work-sharing, severance pay and the like. *Amici curiae* recognize the fallacy in these lines of argument, because the question of bargainability must be examined with reference to specific proposals rather than abstract categories into which such demands might be placed. Consequently, instead of replying to petitioners' extended discourse with comparable vague generalities, we will analyze the particular proposal involved in this case.

In the first place the demand is one for an absolute veto over the abolition of positions, not for consultation, discussion, or joint studies between unions and employers on ways to minimize harmful effects of technological change. Petitioners' demand is thus totally unlike the Armour agreement (Pet. App. 17-18), the proposal in the present steel controversy (Pet. App. 18), and the prior consultation provision in the Maintenance of Way Agreement (Pet. App. 27). Petitioners object to the characterization of their proposal as a "veto" (Br. 42), but it is difficult to find a more apt word to describe it. They suggest that if the

proposal were in effect, the abolition of each position would be a matter for further bargaining. But the proposal would nevertheless give the union the right to stand firm in refusing to grant permission to abolish a position. Despite negotiation, mediation, proffers of arbitration and recommendations of an Emergency Board, petitioners would be able to compel respondent, by court action if necessary, to maintain unnecessary positions. The veto moreover is an absolute one. There is no exception for situations when business conditions require a reduction in force. Cf. Pet. App. 50. Petitioners suggest that they might on occasion withhold their veto. The circumstances of the present case demonstrate that it is most unlikely that petitioners will agree to the abolition of positions when they are no longer required for efficient operations. In any event the delegation of power to control the abolition of positions to a body which does not represent and need not consider the interests of anyone outside its members is objectionable. In *Pacific Intermountain Express Co.*, 107 NLRB 837, enforced *sub nom. National Labor Relations Board v. International Brotherhood of Teamsters*, 225 F. 2d 343 (C.A. 8, 1955), the National Labor Relations Board held invalid a contract which delegated to a union control over questions of seniority. Because of a union's natural tendency to favor its own members, the Board refused to presume that "such control will be exercised by the union in a nondiscriminatory manner." 107 NLRB at p. 845. If control over station agencies is delegated to petitioners, can we presume that it will be exercised in the public interest?

Secondly, the union's proposal has nothing to do with "distributing these [job] opportunities among union members according to some equitable principle" (Pet. App. 4). Contracts requiring seniority to be observed in lay-offs and rehiring promote equitable distribution of existing job op-

portunities, and, as petitioners point out, such provisions are common in collective bargaining agreements (Pet. App. 35). The widespread existence of such provisions assumes a right in management to make lay-offs. Seniority controls as to who shall be discharged when business conditions require a reduction in force. This issue would never arise if a union had the power to prevent all reductions in force. "Work-sharing" provisions are also cited by petitioners (Pet. App. 34, 36). These agreements requiring management to reduce the hours of all employees prior to laying-off any employees also relate only to the manner of distributing existing work. This again assumes a right in management to reduce expenses by curtailing unprofitable operations without the consent of the union. In the same way scope rules and restrictions on subcontracting (see Pet. App. 30-32) relate to the issue of who is to perform work which must be done, not to the question whether or not such work should be performed at all. Work-crew manning requirements are also referred to by petitioners. Such provisions mean "*that if the Company chooses to carry out certain operations, it cannot reduce labor requirements to a level below that which is prescribed by the contract.*" (Pet. App. 42.) (Emphasis supplied.) Of course such provisions do not require a carrier to carry out or continue unprofitable operations, which, as petitioners concede, can be abandoned by displacing an entire crew. *Ibid.* It is one thing to say that if a train is run it must have a crew of 10 men, but quite another for a union to demand that a train must be run regardless of whether its operation is profitable or in the public interest.

A third general area in which collective bargaining procedures have been utilized to promote stable employment is that of guaranteed annual wages (Pet. App. 33-34, 46-47). Contract provisions in this field are designed to compen-

sate for seasonal variations in employment by guaranteeing a certain number² of employees a certain amount of work each year. The problem which called forth petitioners' demand was not seasonal unemployment, but rather the permanent abolition of positions. The demand sought by petitioners is not designed to even out employment of regular employees over the year. When a position is abolished it is because the work done will no longer be required at any time. And petitioners' veto power can be used to require permanent retention of an unneeded position.

More directly relevant to the problem in the present case are contracts providing for severance pay for employees permanently displaced by consolidations, technological change, or changed business conditions. (See Pet. App. 38-42.) Such provisions are in keeping with the general attitude of labor expressed by President Meany of the AFL-CIO in a statement quoted by petitioners:

"Certainly the trade union movement does not oppose technological change. There can be no turning back to a negative or short sighted policy of limiting progress.

... The answer to technological change lies in smoothing its transitions and cushioning the shocks that attend it." (Pet. App. 7.) (Omission in original.)

Petitioners' proposal in the present case represents a very different attitude—that of attempting to veto changes required by modern conditions and of rejecting offers to cushion the impact of such changes. Respondent has not and does not contend that severance pay is a nonbargainable subject. In fact respondent has an agreement for supplemental unemployment benefits payable to displaced

2. A number established in an agreement like that cited by petitioners (Pet. App. 47) is always substantially less than the total number of employees and thus does not prevent the abolition of positions.

employees in addition to benefits payable under the Railroad Unemployment Insurance Act (R. 303-312). This agreement covers employees represented by most of the nonoperating organizations. Respondent offered to extend the terms of this agreement to employees represented by petitioners, but the offer was not accepted (R. 103-104). The distinction between (1) an absolute prohibition on railroad consolidations which result in displacement of employees and (2) the promotion of "fair and equitable arrangements" to protect displaced employees has already been noted (*supra* p. 27). Congress in enacting the Transportation Act of 1940 demonstrated its approval of the latter alternative as a means of harmonizing the divergent policies of promoting efficiency and stabilization of employment. Respondent's offer satisfies this objective. The Emergency Railroad Transportation Act of 1933, cited by petitioners (Pet. App. 21), represented a modified form of the first approach but was allowed to expire in 1935 because it had the effect of prohibiting necessary consolidations. *Jones, Railway, Wages and Labor Relations, 1900-1952*, p. 98 (1953).

A most important distinction also exists between petitioners' demand for a veto over the abolition of positions and a rare but not unheard of provision which restricts lay-offs. (See Pet. App. 19.) The latter kind of agreement protects present employees from losing their jobs but does not prevent reduction in the work force by reason of normal attrition. (See Pet. App. 48; cf. RLEA Br. 40.) Respondent has indicated a willingness to negotiate about an arrangement limiting actual lay-offs over and above the effects of attrition (R. 158). But petitioners will talk of nothing less than a veto over the abolition of positions (R. 118, 150). The abolition of a position would not necessarily result in anyone's losing a job. See *Great*

Northern Ry. Co. Discontinuance of Service, 307 ICC 59, 72 (1959). Present holders of positions no longer needed can be transferred to other jobs, either to existing positions which are vacant or to newly created positions. (See R. 300.) Petitioners' demand on the other hand would deprive respondent of the power to abolish an unneeded position even if the present occupant had quit, retired or died!

Petitioners' long dissertation on "stabilization of employment" shows that this broad term covers a multitude of different contractual provisions that are unlike the demand at issue in this case. Therefore references to "stabilization of employment" in moratorium agreements signed by respondent (see Pet. App. 25-26) do not constitute a prior concession by respondent of the bargaining ability of petitioners' demand. The November 1, 1956, agreement, which permitted the serving of notices dealing with "stabilization of employment," prohibited notices to "establish agreements . . . covering . . . time paid for but not worked" (R. 268). It would seem proper to assume, therefore, that "stabilization of employment" as used in railroad labor relations relates to such matters as work-sharing, seniority, scope rules, etc. which do not require the retention of unneeded employees and thus necessitate "time paid for but not worked." (See R. 287-291.)

Even if there should be any agreements like that demanded in the present case, it would not follow that an unqualified veto over the abolition of positions is a required subject of bargaining under the Railway Labor Act. In the *Borg-Warner* case, there was ample precedent for a contract requiring employees to vote prior to a strike. See *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374, 379 (C.A. 7, 1954); 2 Collective Bargaining Negotiations and Contracts—Basic Patterns in Union Contracts 77:551-556 (B.N.A., 1948). But this Court nevertheless

less held a proposal for such a clause was beyond the scope of mandatory bargaining, even though it had been agreed to by the parties when the case was decided. 356 U.S. at p. 347. Accord, *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. 2d 748 (C.A. 7, 1940). Since parties are free to bargain voluntarily about subjects beyond the scope of mandatory bargaining, instances of a proposal's being incorporated in another contract do not prove that bargaining about such a proposal is required.

Unlike contracts dealing with seniority, work-sharing, severance-pay, lay-offs and the like, petitioners' demand covers the abolition of positions themselves rather than any effect which the abolition of a position may have on employees. Like a demand for a veto over the discontinuance of a train or a branch line, petitioners' proposal relates to respondent's internal procedures rather than relations between respondent and its employees. *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342, 350. Moreover, it relates to those management decisions that Congress has left to state regulation in the public interest under a national policy which respondent's decisions were designed to effectuate. Enforcement of petitioners' demand would seriously frustrate that policy.

II. A STRIKE CALLED FOR THE SOLE PURPOSE OF COMPELLING AN EMPLOYER TO SUBMIT TO A DEMAND BEYOND THE SCOPE OF COLLECTIVE BARGAINING UNDER THE RAILWAY LABOR ACT IS NOT PROTECTED BY THE NORRIS-LA GUARDIA ACT.

Since the petitioners' demand for a veto over the abolition of unneeded positions is not a required subject for collective bargaining, a strike to enforce it is not protected from injunction by the Norris-La Guardia Act. The protec-

tion accorded by that Act to concerted activity is limited to cases in which a "labor dispute" is involved. *Bakery Drivers Union v. Wagshal*, 333 U.S. 437; *Columbia River Co. v. Hinton*, 315 U.S. 143. The question whether the object of a strike by a railroad labor organization involves a "labor dispute" requires a consideration of the objects of collective bargaining as defined by the Railway Labor Act. This Court has held:

"... the Norris-La Guardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30, 40.

The object sought to be achieved by a strike must not be foreign to the objects of the Railway Labor Act. Despite the Norris-La Guardia Act, a labor organization can be enjoined from seeking to enforce an award of the National Railroad Adjustment Board invalid for failure to comply with the procedural requirements of the Railway Labor Act. See, e.g., *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. Clerks*, 188 F. 2d 302 (C.A. 7, 1951); *Brotherhood of Railroad Trainmen v. Templeton*, 181 F. 2d 527 (C.A. 7, 1950), certiorari denied, 340 U.S. 823; *Hunter v. Atchison, T. & S.F. Ry. Co.*, 171 F. 2d 594 (C.A. 7, 1948), certiorari denied, 337 U.S. 916.³ A strike to compel a railroad to discriminate against Negroes in employment violates the Railway Labor Act and may be enjoined. Cf. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768; *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232. A strike against a management decision to close a railroad yard, a subject beyond the scope of collective bargaining defined in the Railway Labor Act, does not involve a labor dispute and

3. The rule is the same in the other circuits.

thus the Norris-La Guardia Act is no bar to an injunction against the strike. *New York Central R. Co. v. Brotherhood of Railroad Trainmen*, 246 F. 2d 114 (C.A. 6, 1957), certiorari denied, 355 U.S. 877.

The RLEA's oblique reference to this last case is followed by several misleading statements (Br. 51-52). The Brotherhood in that case did not claim that the closing of the Toledo Yard in itself violated any agreements, see 140 F. Supp. at 278, and neither party referred the dispute to the Adjustment Board. The case did not involve a minor dispute and does not "fall within the scope" of the *Chicago River & Indiana* decision. The Mediation Board did not refuse to participate, as the RLEA asserts, but rather it intervened twice, the second time on its own motion, and attempted to achieve a settlement by mediation between July 8 through August 1, 1955 and again from August 4 through December 16, 1955 (140 F. Supp. at pp. 274-276).

Since the *Toledo Yard* dispute was fully processed for 5 months under the Railway Labor Act, the failure of the Brotherhood to serve a formal Section 6 notice prior to the negotiation and mediation was at most a technical defect which was not relied on by either the district court or the court of appeals. Petitioners' attempt to use this fact to distinguish the present case is thus unsupportable (Br. 25). The present case is a much stronger one for an injunction, because unlike the closing of a yard, respondent's central agency plan for stations concerned a matter left by Congress to public regulation and the plan was approved by state commissions after hearings in which petitioners were fully represented. Consequently, this Court's statement in *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552, is particularly appropriate here:

"More is involved than the settlement of a private controversy without appreciable consequences to the

public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. . . . Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Although the petitioners in the present case went through the form of serving Section 6 notice on respondent, the ensuing negotiations were made meaningless by petitioners' insistence on a demand beyond the scope of collective bargaining and their refusal to discuss any alternatives (R.118, 150). Petitioners hint in their brief that "original demands are almost invariably altered in the bargaining process" and that the Union might have agreed to a modification of their proposals (Br. 42). But the record shows they did not. Respondent made several proposals for bargaining on ways to alleviate any hardship to employees that might result from the central agency plan (R. 76-77, 103-104, 158). All were rejected. As petitioners' President testified, "the only alternative which up to the present I have offered the North Western was to comply with this rule or strike" (R. 148). Petitioners' attitude is in marked contrast to that of other organizations, such as, for example, the Brotherhood of Maintenance of Way Employees who, when faced by claims of nonbargainability, have been willing to discuss and reach agreements on alternatives. See Pet. App. 26-27.

The duty to bargain collectively requires more than compliance with certain formalities. *Brotherhood of Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F. 2d 36, 40 (C.A. 4, 1953). Insistence by an employer in good faith on a proposal outside the scope of mandatory bargaining constitutes an illegal refusal to bargain and the employer may be required to drop his demand. *National Labor Relations Board v. Borg-Warner Corp.*, 356

U.S. 342. In the same way a union's insistence on a non-bargainable demand violates the union's duty to bargain and is subject to injunction. *National Labor Relations Board v. Retail Clerks International Ass'n.* 203 F. 2d 165 (C.A. 9, 1953); *Penello v. International Union, UMW*, 88 F. Supp. 935 (D.D.C., 1950). Petitioners argue that although an employer may be compelled to drop insistence on a non-bargainable demand by court order, a union is free not only to make such a demand but to strike to compel an employer to submit to it (Br. 38-39). The law is not so one-sided. The *Borg-Warner* case, it is true, did not involve a strike injunction because there an employer used its bargaining power to procure desired proposals by refusing to sign a contract which did not include what the employer wanted. A union, on the other hand, has the strike as its means of enforcing demands. Just as an employer cannot use his economic power to procure nonbargainable demands, a union's resort to a strike to enforce a nonbargainable demand may also be enjoined. *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278 (C.A. 2, 1957); cf. *National Labor Relations Board v. National Maritime Union*, 175 F. 2d 686 (C.A. 2, 1949). When, as here, a strike whose sole object is to enforce a nonbargainable demand is coupled with a refusal to discuss any alternatives to the demand, the strike itself is a violation of the union's duty to bargain. *Douds v. International Longshoremen's Ass'n.* *supra*.

An employer's refusal to bargain is subject to injunction under the Railway Labor Act notwithstanding the Norris-La Guardia Act. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515; *Brotherhood of Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F.2d 36 (C.A. 4, 1953.) Since Section 2 First of the Railway Labor Act imposes the duty to bargain on both carriers and employees, a union's

violation of such duty should also be subject to injunction. Petitioners' duty to bargain would be meaningless unless a strike for the sole purpose of enforcing a nonbargainable demand can be enjoined. Petitioners argue that a private party cannot enjoin a strike growing out of an unfair labor practice (Br. 39). Violations of the Railway Labor Act, however, can be enjoined by private parties, because otherwise the duties imposed by that Act would be unenforceable. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515; *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768; *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30; *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232.

Not one of the cases involving the Norris-La Guardia Act cited by the RLEA in its brief (pp. 48-51) is in point, because none concerns a union with a statutory duty to bargain on certain subjects, whereas the Railway Labor Act imposes on petitioners the duty to make agreements concerning rates of pay, rules, and working conditions in order to avoid interruptions to commerce. None of the cited cases concerns a labor organization under the Railway Labor Act, and all of these decisions were prior to 1947 when the duty to bargain was first imposed on unions outside the Railway Labor Act. A number of the cited cases do not even concern injunctions against a strike.⁴

The injunction ordered by the court below does not prohibit a strike to obtain higher pay or better working conditions. Such an injunction "strips labor of its primary weapon without substituting any reasonable alternative." See

4. *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91 (quoted at page 48) and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (quoted at page 49) concerned picketing only. *United States v. Carrozzo*, 37 F. Supp. 191 (N.D. Ill. 1941), affirmed, 313 U.S. 539, involved a criminal indictment for violation of the Sherman Act.

Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U.S., 30, 40. But when a union feels aggrieved by a management decision such as the central agency plan, two reasonable alternatives to a strike are open. First, since railroads' actions are subject to regulation by state or federal administrative bodies in the public interest, management decisions of this type must be approved by such bodies. Labor organizations may appear before these tribunals to protest changes which may affect them adversely. The conflicting interests of labor, management, and the general public can be considered, weighed and reflected in the decisions of such a body. When the Interstate Commerce Commission is called upon to authorize abandonment of a train, representatives of employees are permitted to present objections and consideration will be given to the effect of the discontinuance on employees. *Great Northern Ry. Co. Discontinuance of Service*, 307 ICC 59, 74 (1959). In *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, a dispute arose as to whether under an Interstate Commerce Commission order the employees of trunk-line railroads should handle movements over the tracks of the River Road or whether these operations should be performed by employees of the River Road. The Brotherhood representing the latter group was allowed to intervene in a suit brought by the trunk-line railroads to require that the work be done by their own employees. But though the union was permitted to argue the issue in court, the Norris-La Guardia Act did not prevent the court from issuing an injunction awarding the work to the trunk-line railroads. *Baltimore & Ohio R. Co. v. Chicago River & Indiana R. Co.*, 170 F. 2d 654 (C.A. 7, 1948), certiorari denied, 336 U.S. 944. A similar procedure was followed in the present case. Petitioners were permitted to and did present objections to the respondent's

central agency plan before the Commissions in Iowa and South Dakota (R. 172, 217-18). Petitioners were able to block a similar proposal by another carrier in Minnesota by court action (R. 147). They sought judicial review of the South Dakota Commission's determination that the respondent's plan was in the public interest (R. 56).

A second alternative is open to petitioners in place of the strike called to prevent abolition of these unproductive positions. Respondent concedes that the employment consequences of the abolition of a position are an appropriate subject for collective bargaining. Respondent remains ready and willing to discuss ways to alleviate hardship to any employees adversely affected by the abolition of a position. Such matters as transfer of displaced employees to productive work on a seniority basis, severance pay, limitation on lay-offs, or other alternatives are open to negotiations. Petitioners in their "appendix" suggest a host of matters relating to stabilization of employment as it affects employees which are concededly bargainable and about which respondent has already expressed a willingness to bargain (R. 76-77, 103-104, 158). As the court noted in *New York Central R. Co. v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273 (N.D. Ohio, 1956), affirmed, 246 F. 2d 114 (C.A. 6, 1957), certiorari denied, 355 U.S. 877 (140 F. Supp. at pp. 282-283):

"The closing of the North Toledo Yard may have the effect of requiring a reallocation of the work of thirty-five employees. If and when it does, that issue can and must be met, and it must be met in compliance with the requirements of the Railway Labor Act. The closing of the Yard as decreed by management is the initial step—that comes first. If and when the interests of the employees require attention as a result of the closing, then under the terms of the Railway Labor Act plaintiff and defendants are required to negotiate.

"We believe that a labor dispute cannot be found over the closing of the North Toledo Yard by seeking to incorporate in that action the anticipatory results upon the employees. The latter is a separate and distinct problem that may be met when the time arrives."

So also the abolition of a position, the closing of a station, the discontinuance of a train or of a branch line are not in themselves subjects of mandatory bargaining or strikes. This imposes no irremediable hardship on labor because insofar as these actions have an effect on employees, these employment consequences are bargainable.

III. THE RAILWAY LABOR ACT PROHIBITS STRIKES FOR THIRTY DAYS FOLLOWING TERMINATION OF THE SERVICES OF THE NATIONAL MEDIATION BOARD.

Petitioners' point VII B (Br. 69-71) concerns an issue which is long since moot and need not be decided by this Court. The right of a union to strike during the thirty days following the second intervention by the National Mediation Board is no longer an issue in the case because this time period expired over a year ago. *Amici curiae*, therefore, do not brief this matter.

Petitioners' point VII A (Br. 65-69) concerns the right to strike during the thirty days following the first attempt at mediation and is also moot. Moreover, it was not raised in the petition for certiorari and therefore is not appropriate for decision by this Court. Nevertheless, the question is so important under the Railway Labor Act that *amici curiae* cannot let petitioners' misstatements remain unanswered.

Petitioners' assumption that the Railway Labor Act is a one-way street, imposing obligations on employers but

not on employees, is also apparent in this portion of their brief. They assert that although Sections 5 First and 6 of the Act require a carrier to maintain existing conditions pending mediation and for thirty days thereafter, no such duty is imposed on employees (Br. 66). It is true that Section 6, which covers the period of mediation proceedings, does refer specifically to carriers only. Section 5 First, however, covers the thirty-day period following mediation and does not refer to either party particularly. And it is clear from the legislative history of the Railway Labor Act that employees were required to refrain from striking even during the period covered by Section 6. During the hearings before the House Committee on Interstate Commerce, Mr. Richberg, the chief spokesman for labor and one of the principal draftsmen of the Act, was asked:

"Now, does the bill carry any provision wherein the parties agree, pending mediation or adjustment or arbitration, that the status quo shall be maintained, that is, the continued operation of the railroads?

"Mr. Richberg. There are several provisions operating to carry out that idea.

"Mr. Garber. Is there any direct provision wherein the parties agree that, pending the adjustment of their controversy, the continued operation of the railroads shall be maintained?

"Mr. Richberg. Yes. I would like to take these provisions one by one, in order to show their cumulative effect.

"Mr. Garber. All right.

"Mr. Richberg. In the first place, it is their duty to exert every reasonable effort-taking page 3-to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate

violation of that legal duty could be prevented by court compulsion." (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180, 69th Cong., 1st Sess., pp. 90-91 (1926)).

"As to maintaining the existence of the status quo from the time a dispute is engendered, it is a violation of the duties imposed by this law *for either party* to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law" (*idem* at p. 92).

"Mr. Richberg . . . As I have said, we have not sought to write a prohibition upon one party; we have sought to place upon both parties the obligation to maintain conditions unchanged, and that obligation, I will say frankly, can certainly be enforced against any concerted move to change the conditions.

"Mr. Fredericks. Do you construe that then to mean that pending negotiations the employees' organizations could not call a strike?

"Mr. Richberg. They could not carry out a strike." (*Idem* at p. 94.)

In the House debates it was stated:

"There is one assurance the American people will have and that is that from the beginning of a dispute, all through the period of conciliation, all through the period of mediation, all through the period of arbitration, and for 60 days following the calling of the emergency board by the President of the United States, there will be no strike, there will be no interruption of traffic.

"Those who framed this bill are on record as stating that this is their interpretation of the language of the bill." 67 Cong. Rec. 4657.

The co-author of the Norris-La Guardia Act, in speaking of the Railway Labor Act, recognized that "the workers

could not and would not think of going on strike before all the remedies provided in the law have been exhausted." 75 Cong. Rec. 5504. This Court in speaking of major disputes under the Railway Labor Act has stated:

"The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self help." *Elgin, J. & E.R.Co. v. Burley*, 325 U.S. 711, 725.

In *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (C.A. 4, 1957), certiorari denied, 355 U.S. 914, the Brotherhood sought to avoid the *Chicago River & Indiana* decision (353 U.S. 30) by arguing that the dispute was a major one. But the court affirmed an injunction, holding that a strike even over a major dispute is subject to injunction unless the procedures of the Railway Labor Act are first exhausted:

"If 'the moral force of public opinion (is the) ultimate sanction' of the Act in the disposition of 'major disputes,' it is incumbent upon the parties to submit themselves to the successive procedures of the Act before resorting to self-help. * * *" 248 F. 2d at p. 45.

The Brotherhoods, therefore, were not "free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a 'major dispute' under the required procedures of the Act." *Id.* at p. 46.

Petitioners' argument that a strike may be called at any time before an emergency board is appointed was rejected in *Brotherhood of Railway Clerks v. Railroad Retirement Board*, 239 F. 2d 37 (C.A. D.C., 1956). In that case a strike begun during mediation was held to violate the Railway Labor Act and the striking employees were there-

fore denied employment compensation benefits by the Railroad Retirement Board, whose decision was affirmed by the court of appeals. The same position is also taken by the National Mediation Board. The Board's memorandum filed in this Court refers to "a strike call issued at the end of the 30-day standstill period required by the statute" (p. 2), and "a strike called following the termination of the required 30-day standstill period" (p. 6). Thus, though the Board argues there is no second thirty-day waiting period required after a second attempt at mediation, it assumes that the first thirty-day requirement binds employees as well as carriers.

Neither *Brotherhood of Railroad Trainmen v. Toledo P. & W. R. Co.*, 321 U.S. 50, nor *Butte, A. & P. Ry. Co. v. Brotherhood of Locomotive Firemen*, 268 F. 2d 54 (C.A. 9, 1959), certiorari denied, 361 U.S. 864, cited by petitioners (Br. '65), supports their argument that unions are free to strike at any time until an emergency board is appointed. In the first case, the National Mediation Board's initial mediation was terminated on November 21, 1941, and the strike did not begin until December 28, 1941. 321 U.S. at pp. 51-52. In the *Butte* case, the carrier did not contend that the strike was commenced during the thirty-day waiting period. The carrier insisted that mediation was terminated on January 17, 1958 and there the strike was originally called for March 14, 1958. 268 F. 2d at pp. 56-57. In fact, the strike had still not begun when the court of appeals handed down its decision over a year later. *Ibid.*, note 7.

Therefore, if the Court feels it necessary or proper to decide the issue raised by petitioners' point VII A, the legislative history and judicial and administrative interpretation of the Railway Labor Act demonstrate that the waiting periods prescribed by the Act are applicable to unions as well as to carriers.

IV. THE DISTRICT COURT HAD POWER TO ISSUE AN INJUNCTION PENDING APPEAL.

Petitioners' Point VI (Br. 57-64) is devoted to another issue which this Court need not decide. Whether or not this Court affirms the decision below, the question of the propriety of the district court's injunction pending appeal will be moot. The question would only be relevant in contempt proceedings for violation of the district court's order, but here petitioners have complied with the injunction issued under Rule 62 (c) of the Federal Rules of Civil Procedure.

In any event, petitioners' contention on this point is without merit. It is true but irrelevant that the Federal Rules of Civil Procedure were not intended to modify federal statutes such as the Norris-La Guardia Act. But in the present case the applicability of the Norris-La Guardia Act was seriously disputed. Pending a final determination of this question, the district court was not without power to preserve existing conditions. In *United States v. United Mine Workers*, 330 U.S. 258, this Court held that regardless whether the Norris-La Guardia Act was ultimately held to apply in the case before it, the district court had power to enter a temporary restraining order against a strike pending decision of the jurisdictional issue.

"The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-La Guardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of the jurisdictional question. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction." 330 U.S. at p. 290; see also 330 U.S. at pp. 309-311 (concurring opinion).

The same principle gave the district court the power to issue its injunction pending appeal.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HOWARD NEITZERT,
WALTER J. CUMMINGS, JR.,
WILLIAM M. McGOVERN, JR.,

Attorneys for Bureau of Information of Eastern Railways, The Association of Western Railways, and Bureau of Information of Southeastern Railways.

SIBLEY, AUSTIN, BURGESS & SMITH,

Of Counsel.

December 1959.

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 100**THE ORDER OF RAILROAD TELEGRAPHERS,****A VOLUNTARY ASSOCIATION, ET AL.,***Petitioners,**vs.***CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,***Respondent***PETITIONERS' REPLY BRIEF.**

**ALEX ELSON,
LESTER P. SCHOENE,**

**1625 K Street, N. W.,
Washington 6, D. C.**

Attorneys for Petitioners.

**BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,**
Of Counsel.

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Respondent.

PETITIONERS' REPLY BRIEF.

I.

THE FACTS.

The Railroad's statement seeks to ignore or obscure one paramount fact: This lawsuit arose out of the refusal of the Railroad to bargain with the Union concerning the contract change proposed by the Union's Section 6 notice. This transcendent fact is clearly established by the findings of the District Court:^{*}

"4. Plaintiff by letter dated December 24, 1957 acknowledged receipt of the Section 6 notice and took the position that the subject matter of the proposed

* Respondent expressly states it challenges none of the findings except a portion of Finding No. 17. (R. 357.) (Respondent's brief, p. 17, n. 1.) We deal with its contention as to Finding 17 at p. 16, note.

rule was not a proper subject matter for a Section 6 notice. Plaintiff took the same position in the conference held between representatives of the plaintiff and Telegraphers on January 17, 1958, and reiterated the same position in a later letter dated January 21, 1958." (R. 352.)

"20. The plaintiff has refused to negotiate, confer, mediate or otherwise treat with defendant Telegraphers on the proposed change in agreement set forth in the Section 6 notice served by defendant Telegraphers on plaintiff on December 23, 1957. * * * (R. 357.)

It is clearly established by the testimony of Mr. Ben Heine- man, Chairman of the Railroad:

"You understood my testimony correctly that after the proposed rule of the Order of Railroad Telegraphers was served in December of 1957, I personally participated in making the decision that the Telegraphers should be told that it is not a bargainable subject matter. I was then fully aware of that attitude of the carrier from its inception. That attitude on that particular rule has not been modified nor in my opinion can it be." (R. 104.)

Notwithstanding the record, the Railroad still attempts to create the impression that it was the Union and not the Railroad that refused to bargain.

First of all, the Railroad characteristically and tacitly shifts the subject of discussion—this time from the statutory notice to its own Central Agency Plan. Certainly it is true that the Railroad belatedly indicated a willingness to discuss with the Union this quite different matter. The District Court so found in the same finding in which it found that the Railroad refused to bargain concerning the statutory notice:

"20. * * * The plaintiff did show willingness to negotiate upon the Central Agency Plan, including a possibility concerning severance pay." (R. 357.)

The finding of the District Court is wholly consistent: The Railroad refused to bargain as required by law concerning the subject of the statutory notice; it belatedly indicated willingness to discuss, outside the framework of the Rail-
way Labor Act, quite another matter—its own unilateral scheme for centralizing agencies. The Railroad's emphasis, therefore, on a casual and very brief conversation between the chairman of the Railroad and the president of the Union—long after the proposal for contract revision had been served and while mediation was in progress—concerning the possibility of agreement on the plan which the Railroad was obdurately proceeding to place in effect (Resp. brief, p. 15), is to no purpose whatever. Indeed, both parties regarded the conversation as so unrelated to the contract proposal of the Union that neither of them told their representatives about it, although the matter was then pending in mediation and the mediator was actively conferring with the parties.* (R. 111, 154.)

Even more pointless is the Railroad's distortion of testimony given by counsel for the Union in connection with a wholly unrelated matter, a half year after this case had

* Another instance relied upon by the Railroad to show that it was willing to bargain relates to its claim that it made certain statements to the Mediator during the emergency mediation on August 19th, the day before it filed this action in the District Court. Whatever was said to the Mediator was not communicated to the Telegraphers. (R. 143-144, 154.) The laxness of Respondent's handling of the facts stands out upon a comparison of note 1, p. 13, Respondent's brief with the actual testimony (R. 143, 144) and its complete disregard of the testimony of another witness. (R. 154.) The remaining item has to do with the willingness of the Railroad to extend its agreement for supplemental unemployment benefits to the Union. The only thing in the record on this is the statement of the Chairman that the Plan was offered to the O. R. T. in the Fall of 1957 (R. 103-104), prior to the service of the Section 6 notice. The statement in the Railroad's brief (p. 16) that an offer was made "during the controversy over the threatened strike" is not supported by the record unless the offer be considered as having been made by Mr. Heineman when he was testifying during the hearing.

been decided in the District Court. The Railroad presumes to characterize the attitude expressed in the testimony in these words: " * * * never bargain with a private employer if you can bargain with Congress." (Resp. brief, p. 20.) We are confident that no fair-minded reader can place a similar interpretation upon this testimony (Resp. brief, pp. 19-20), particularly when read in context.* Attributing such an attitude to the Union comes with very bad grace indeed from the Railroad, which has maintained throughout this case, and even now maintains that it will not negotiate with the Union concerning a contract provision relating to job discontinuance, but will deal exclusively with state regulatory commissions.

A second area of fact distortion relates to the Railroad's principal theory, that the contract proposal contained in the Union's Section 6 notice would frustrate state regulatory action and hence is illegal. This is accomplished by a lengthy description of the Central Agency Plan by the Railroad and the initiation by it of proceedings before various state commissions for approval of the plan. The first reference to the Section 6 notice served by the Union is placed in such context as to give the impression that in point of time it was an afterthought of the Union, directed at the frustration of orders already entered by state commissions. Thus in the Railroad's statement of questions presented, there is the following:

- .. "Did Congress intend that the interruption of inter-state commerce incident to a railroad strike can be founded upon a contract demand that no position in being on a date antecedent to the demand be discon-

* Before the colloquy which respondent quotes occurred, Senator Morse had sharply differentiated between unemployment insurance as a proper subject for legislation and dismissal compensation which the Committee felt should be the subject of collective bargaining. Hearings on S. 226, 86th Congress, 1st Session, pp. 100-103, Subcommittee on Railroad Retirement, the Committee on Labor and Public Welfare, United States Senate.

tinued without the Union's consent, where the purpose and effect of such demand is to prohibit the carrier's compliance with state commission orders, in a sector of interstate commerce left by Congress to state regulation in the interest of economical and efficient transportation service to the public?" (Emphasis added.) (Resp. brief, Question 1, p. 21.)

The brief of the Railroad Associations *amici curiae* puts the question as follows:

"Is a railroad labor organization's demand for a veto over the abolition of positions a required subject of bargaining under the Railway Labor Act where the demand is designed to frustrate a plan for coordinating station agencies which has been approved by state regulatory commissions?" (Emphasis added.) (Railroad Assoc. brief, Question 1, p. 3.)

The simple and undisputed fact is that the Section 6 notice was served by the Union on December 23, 1957, and the first order to be entered by any state commission was the South Dakota order, entered on May 9th, 1958 (R. 193) and modified on June 13, 1958. (R. 340-342.) The only other state commission order entered prior to the commencement of the action was the Iowa order, entered on August 11, 1958, less than ten days before the commencement of this action. (R. 216-46.) When the Section 6 notice was served on December 23, 1957, a petition initiated by the Railroad was pending before the South Dakota commission for authority to close 69 stations, or alternatively for approval of the Central Agency Plan. The Railroad operates in nine states. (R. 5.) No order that might later be entered by the South Dakota Commission could alter the rights and duties of the parties with respect to collective bargaining under the Railway Labor Act. (See Part II, *infra*.) But even if there were any substance in the Railroad's argument concerning the overriding authority of the state commissions, any order which the Sout'l Dakota Commission

might later issue (1) could not result in abolition of positions of employees, other than station agents at one man stations in South Dakota,* and (2) could not similarly affect any of the employees, including station agents, represented by the Union and employed in other states. The Section 6 notice related to all positions represented by the Union in all states in which the Railroad operates.

Moreover, the Railroad first refused to bargain with relation to the Section 6 notice on December 24, 1957. In its letter of that date (Def. Ex. 2, R. 33) no reference is made to the Central Agency Plan nor to any proceeding before any state regulatory commission. The refusal to bargain was placed on two grounds, both of which have been abandoned by the Railroad on this appeal; first, that the subject matter of the Section 6 notice was not a proper subject since it did not concern rates of pay, rules and working conditions, and second, that the Section 6 notice was an attempt to usurp management prerogatives.

The service of the Section 6 notice must be viewed in the light of the facts that the new management, in the space of two years, had reduced the number of employees from approximately 26,000 to approximately 18,000, a net reduction of 8,000 (R. 87, 166), and at the time of the service of the Section 6 notice more than 100 positions other than station agents had been abolished.** (R. 120.)

* The Union represents, in addition to station agents and assistant agents, telegraph operators, telegraph operator-clerks, telegraph operator-levermen, telephone operators, operators of printing telegraph machines or similar devices, non-telegraph-levermen, and tower and train directors. (Agreement between North Western and Union, Ex. 19, Rule 1, R. 137.)

** Typical of the handling of facts by the Railroad is this statement (Resp. brief, note 1, p. 4): "In his testimony Mr. Leighty, President of the O. R. T. referred vaguely to the 'slaughter' of 100 jobs over and above those involved in the Central Agency Plan. (R. 120.) When pressed on cross-examination, he could not identify these jobs with any precision (R. 141-2, 322); and the only specific occasion of job losses he cited was the taking over

The District Court found that "The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agreement on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on December 23, 1957." (Finding 19, R. 357.) This finding is not challenged by the Railroad. Instead the Railroad disregards the finding and presents a statement of facts to this Court devoted to an elaborate discussion of the Station Agency Program, the reasons therefor, the record of its respective petitions filed with various state commissions to obtain permission to effectuate the Station Agency Program and a realignment of facts, seeking to give the impression that the dispute which gave rise to the strike was over the Station Agency Program. The Railroad did not succeed in persuading the District Court to accept this version of the facts, and cannot have a trial *de novo* before this Court.*

by North Western of the operation of its wholly owned subsidiary, the Omaha." Mr. Leighty stated that his testimony was based on the membership records of the Telegraphers. (R. 141.) To expect the President of a national union representing thousands of employees to relate from memory the particular positions abolished is, of course, entirely unreasonable. The Railroad with its payroll records at its command did not offer any evidence to contradict Leighty's testimony and in fact, did not claim it was untrue, nor does it claim it is untrue in its brief filed in this Court. It seeks to meet the testimony by referring to a compilation of positions abolished since the service of the Section 6 notice (Resp. brief, page 4, note 1), which compilation, of course, has no bearing on positions abolished prior to service of the Section 6 notice.

* The Railroad's proposed finding No. 5, rejected by the District Court, read in part as follows: "This proposal (Section 6 notice) was prompted by, and was directly addressed to, plaintiff's action in announcing and moving to seek authority for its Central Agency Plan; and the threatened strike founded on this proposal results from the Central Agency Plan."

II.

THE DECISION OF THE COURT OF APPEALS CANNOT BE SUSTAINED ON THE THEORY THAT PERMISSIVE ORDERS OF STATE REGULATORY COMMISSIONS SUPERSEDE THE PROVISIONS OF THE RAILWAY LABOR ACT.

For understandable reasons, the Railroad has virtually abandoned any attempt to defend the opinion of the Court of Appeals. The abandonment of the contention that no labor dispute is involved is express. (Resp. brief, pp. 33-36.) So also is the abandonment of the intemperate claim that the subject of the proposed agreement was solely a matter of "managerial prerogative."** (Id., 40.) An attempt

* Nevertheless, the Railroad does invoke that last resort of the desperate litigant, the *reductio ad absurdum*, contending that our comprehensive interpretation of the duty to bargain would open the door to unacceptable results. ("Will the ORT concede that its members may be legally locked out upon the basis of any demand the North Western may choose to serve, and to stand upon, under Section 6, no matter how outrageous in its purpose and effect with respect to independent unionism?" (Resp. brief, p. 64.). If the entire universe of railroad operations were to be considered, it is clear, of course, that there are certain matters (such as the selection of managerial personnel or of union officers) that are exclusively within the province of the Railroad or of the employees, respectively, and are treated as such by the Railway Labor Act. (Section 2, Third.) Apart from such matters, there are those which, once within the exclusive control of management, have been bargained about and therefore are no longer subject to management's unilateral discretion. There are others of mutual concern now in the control of management because not yet made subject of agreement but which may in the future be the subject of agreement. The history of bargaining in the railroad industry is a dynamic and evolutionary one; just as changing times and technological developments give rise to new problems of efficiency in operation, so also do they give rise to new problems of labor relations. Thus the area in which bargaining is required must expand in response to the need for maintaining peace and continuity of operations in the industry. Significantly, while the Railroad and the Railroad Associations *Amici* cast some animadversions upon the Appendix to Petitioners' brief, neither disputes the fact that for some 27 years following the enactment of the Railway Labor Act the parties by their practice interpreted the Act as placing no

is made, however, to preserve the substance and effect of that argument in a more subtle and polite way. The suggestion now is, not that job abolition is the arbitrary prerogative of management, but that the new management of the Railroad has exercised its discretion wisely and has reached a decision which will contribute to the efficiency of its operations, and that all right-thinking people, including the Justices of this Court, should agree that this is so. The question presented by this case, however, is not whether the Central Agency Plan is good railway management. Times have changed, technological progress has created extensive possibilities of increased efficiency, and at the same time extensive possibilities of human injustice related to technological unemployment. So long as the Railroad has need of the services of human beings, it must bargain with their lawful representatives for those services.

We have emphasized from the beginning that the central question is whether a labor union is to have a voice in determining how the fruits of increased productivity and the burdens of consequent technological unemployment are to be distributed between employers and employees. Labor's interest in the matter is ignored by the Railroad. It chooses rather to emphasize to the Court that progress and efficiency are good things, minimizing the human side of the balance sheet. While it no longer employs the crude war cry of "managerial prerogative", its present suggestion that the Court should approve the Central Agency Plan as the product of wise and efficient management equally excludes employees from any interest or concern in the matter.

"Managerial initiative" (*Id.*, 57) has replaced "managerial limit on subjects of collective bargaining, or the recent origin of the "non-bargainability" argument, nor is there any challenge by the Railroad to that portion of petitioners' brief which establishes that this Act requires bargaining as to all subjects. (Petitioners' brief, pp. 26-33.)

gerial prerogative" as the question-begging formula that is central to the Railroad's argument—managerial initiative, with the passive blessing of assorted state regulatory agencies. For the Railroad is willing to share with state regulatory agencies, and perhaps with this Court—though not with the organization representing the Railroad's employees—responsibility for determining what economy measures are desirable in the interest of efficiency. Indeed, the Railroad's whole case is now reduced to the proposition that Congressional transportation policy has vested sole responsibility for determining questions of job abolition and technological unemployment in management, subject to review by state regulatory agencies. Although the consequences of such determinations are vital to the labor movement and the welfare of the employees, the employees are to have no voice whatever, and collective bargaining is to play no part in their consideration.

This remarkable proposition rests upon a still more remarkable argument spun from "legislative history". There is one hard kernel of historical fact in the argument: In its report on the Transportation Act of 1958 the Conference Committee agreed to the House version of what was to become Section 5, rejecting the Senate version, which would have vested in the Interstate Commerce Commission jurisdiction over discontinuance of "any station, depot or other facility". It is quite clear, we agree, that this fact shows that Congress intended to leave matters *in statu quo ante*, and did not intend to lodge jurisdiction over such local matters in Washington, where the interested members of the public could be heard only with considerable difficulty and expense. But the Railroad would derive more—fantastically more—from this meager fact: By its inaction, by its passiveness, by its mere failure to extend the jurisdiction of the Interstate Commerce Commission to matters of primarily local concern, Con-

gress has, by implication, *amended* the Railway Labor Act—the fundamental charter of national policy for railway labor—and this although Congress on this occasion was in no way concerned with problems of labor relations in the industry. By negative implication Congress amended the Railway Labor Act so as to withdraw from the duty to bargain, imposed by that act, a subject of the utmost concern to railway labor—and this although the most elementary principles of representative government would have dictated that no such revolutionary change be attempted without full disclosure of the purpose and without fully hearing the interests to be affected. By negative implication Congress amended the Railway Labor Act not only so as to withdraw the duty to bargain concerning the proposed abolition of jobs, but so as to make it *unlawful* for a union representing railway employees to assert the right to bargain collectively concerning such problems. Hence, by a further negative implication, superimposed upon the first, Congress *amended* also the Norris-LaGuardia Act—that capstone of national policy concerning the intervention of courts into labor disputes.

Absurd as this statement of the argument necessarily is, the argument of the Railroad amounts to no more and no less. Concededly, what is involved in this case is a labor dispute. The Railroad therefore proceeds to evade the Norris-LaGuardia Act's denial of jurisdiction by contending that the labor dispute is unlawful. It seizes upon the notion that, by not extending the jurisdiction of the Interstate Commerce Commission to station closings, Congress established, by implication, an overriding national policy vesting complete control of such matters in state regulatory commissions; and excluding labor from any voice, through collective bargaining, in their resolution.

The argument assumes that railroad regulation is what it is not; that in each of the nine states concerned there

is an agency charged with initiating and effectuating an aggressive program for eliminating waste and increasing efficiency on the railroads and with authority to control labor costs. The Railroad well knows that this is not so and never has been so, although it makes that concession rather late (*Id.* 57) in an argument which tends to create the impression that Congress is overjoyed with the great job that the state agencies are doing in the matter of modernizing the railroads. The truth, of course, is that railroad regulation by the states is passive and permissive; the state initiates nothing.

"Managerial initiative necessarily underlies the system of largely permissive authority which is basic both to federal and state regulation. *Management propose, and the commissions dispose.*" (*Id.* 57. Emphasis supplied.)

Thus the argument of the Railroad reduces to the proposition that the overriding national policy declared (by implication) by Congress is that prime responsibility for decisions relating to modernization, and to the effect of technological change upon job tenure, is vested in *management*, subject only to passive review and permissive approval by state regulatory commissions. In this process organized labor is to have no part; it is *illegal* for it to assert a right to participate through the established procedures of collective bargaining.

In effect, the Railroad's argument is that collective bargaining as to the abolition of jobs may result in increased labor costs which may, in the opinion of state commissions, be wasteful and hence collective bargaining cannot be permitted. This proposition runs counter to an historic and basic principle of rate regulation. The Interstate Commerce Commission and state regulatory bodies take labor costs as they find them, in the same way as costs of equipment, supplies, executive salaries, and other costs.

Public Utility Commissions do not regulate wages any more than they regulate the prices of the commodities essential to the transportation industry. A classic statement of the position of Congress was made on this subject in the debates leading up to the enactment of the Railway Labor Act in 1926, by Congressman Barkley, in successfully opposing an amendment which was construed as giving the Interstate Commerce Commission authority in the matter of wages. He said:

"• • • if the public has a right to fix the compensation of men who labor on railroads merely because the public ultimately pays the bill in freight rates, which are only a small portion of ultimate prices, then, if we follow that logic to its conclusion, the public would have the same right to fix the compensation of men who labor in the industries which produce the freight to be carried in commerce; and this, in turn, would put the public, through the agencies of government, into the fixing of all costs and of all prices, because in the end the public must pay all this in the price of what it buys. This would ultimately mean Government operation of everything, which is unthinkable." (67 Cong. Rec. 4519.)

The fact is that the entire argument relating to state regulatory authority is beside the point so far as the issue in this case is concerned. The issue here concerns the right to bargain collectively with respect to job abolitions. Who abolishes jobs? Not the commissions, but management. To be sure, management may have to get the permission of an agency established to safeguard the interests of the members of the public who use the railroads; but the agency does not abolish jobs. The entire argument depends for its success upon the creation of an illusion that an all-powerful state-national agency commands the railroad to abolish jobs, so that labor organizations have no voice in the matter. Nothing could be farther from the truth. If the railroad is "ordered" to abolish jobs (which

it is not, but only permitted)* it is only because the railroad has pleaded that it be so commanded. There is not the slightest reason why the Railroad's resort to the commissions for authority to abandon positions should not be preceded and shaped by the process of collective bargaining. By the facile, self-serving formula, "Managements propose, and the commissions dispose", the Railroad seeks to read collective bargaining out of national policy whenever a labor dispute touches upon matters which management may submit to a state regulatory agency for approval.

The Interstate Commerce Commission, in an area in which it is given broad regulatory powers, has emphasized that its function is merely to "authorize or permit" the applicant carriers to enter into a proposed transaction; that it has no power even to compel a carrier to consummate a transaction authorized by the Commission; and that, even where it has power to impose duties as a condition of granting permission, that power is limited to the imposition of duties on the carrier, and does not extend to employees or organizations of employees. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease, I. C. C. Finance Docket No. 19432* (May 5, 1958). The Commission had authorized North Western, coincidentally the respondent in this case, to lease the lines of the Chicago, St. Paul, M. & O. Ry. Co., to be integrated into the North Western system. Difficulties relating to seniority rights of employees were encountered in the process of integration, and North

* Throughout this litigation the parties have disagreed as to the permissive or compulsory character of the orders of the state regulatory commissions. The Railroad now seems to concede that the orders are permissive only. (Resp. brief, pp. 56-57.) Lest there be further confusion, we cite here the pertinent portions of the record, which speaks for itself: *Action of the South Dakota Commission: Findings 6, 7 and 8* (R. 192-193). Order (R. 194-95). Order denying Rehearing (R. 213-215, esp. 214-215). *Action of the Iowa Commission: Order* (R. 236-7.) Excerpts from Iowa Code 1958 (R. 242-43).

Western applied to the Commission for a supplementary order requiring "the parties" (i. e., the Railroad and certain unions) to undertake discussions for the purpose of effectuating the integration, and to report their progress to the Commission. In addition, the Railroad asked the Commission to declare that the parties were relieved of the "restraints, limitations and prohibitions" of Section 6 of the Railway Labor Act, pursuant to which mediation proceedings were in progress. All the requested relief was denied. The Commission said:

" * * * Likewise under Section 5 of the [Interstate Commerce] Act we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction * * * .

"Under section 5(2)(f) of the Act, we are required to impose upon the carriers in each approved transaction, conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything. Thus, North Western's request that we order such parties to negotiate and report back to us must be denied."

The Commission denied also the requested declaration that the Railroad was relieved of the restraints of the Railway Labor Act, stating that it had no authority to interpret section 5 (11) of the Interstate Commerce Act, on which the request was based, and adding:

"Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do." *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease, I. C. C. Finance Docket No. 19432 (May 5, 1958).*

There is absolutely no conflict between the proposed contract provision and state or national authority. The provision simply calls for the normal operation of collective bargaining with respect to proposals to abolish jobs which may be presented by management to the commissions. The Railroad's repeated characterizations of the contract proposal as vesting in the Union a "veto" power over job abolitions masks its persistent refusal to bargain about the proposal. Had the Railroad engaged in the normal processes of collective bargaining instead of vetoing the procedures of the Railway Labor Act, some modification of the contract proposal would in all likelihood have resulted. But assuming the Railroad had agreed to the contract proposal without modification, any Union would recognize the need for its sensible administration. Apart from the continuing character of the relationship which has implicit in it a give-and-take process, the Railroad is not without a remedy since it would have a right to institute elimination of the contract provision by the serving of a thirty-day notice at any time.* This right is an effective check against arbitrary or unreasonable action.

* The agreement between the Railroad and the Union is not for a fixed period and is subject to change at any time by service of a Section 6 notice. (R. 161-2.) This fact underlies the basic fallacy in respondent's attack on the last sentence of Finding 17, the only finding challenged by it. (Resp. brief, p. 17.) This finding reads as follows:

"The proposed contract change incorporated in the Section 6 notice served by the defendant Telegraphers on December 23, 1957 relates to the length or term of employment as well as stabilization of employment. Collective bargaining as to the length or term of employment is commonplace. There are a variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical

The hollow core of the Railroad's entire argument is best revealed by the Railroad's own words:

"Congress did not intend to substitute economic warfare for regulation in this area of interstate commerce—to submit issues of this kind for determination by ordeal of battle rather than by the public authority provided for this purpose." (Resp. brief, p. 23.)

Substituting plain words for the expletives "economic warfare" and "ordeal by battle", we submit that what Congress did indeed clearly intend was to leave labor disputes such as this to be resolved by collective bargaining and the free play of economic forces, and not that they should be resolved by "managerial initiative" with the passive consent of state regulatory agencies in a process from which collective bargaining is excluded and labor has no voice.

to the rule proposed by the defendant Telegraphers are in existence on at least two railroads." (R. 356-7.)

The only point of difference between the Union's proposal and the contract provisions which formed the basis for the last sentence of the finding stated by the Railroad relates to the length of the proposed agreement. The Railroad states that the Seaboard Agreement (in effect for more than thirty years) is from year to year, the Yardmaster agreements are for a period of two years, but the contract proposal here involved would continue in perpetuity. Ignored in this statement is the right to serve a thirty-day notice of contract change at any time.

III.

THE DECISION OF THE COURT OF APPEALS CANNOT BE SUSTAINED ON THE GROUND THAT THE LABOR DISPUTE INVOLVED IS A "MINOR" DISPUTE.

The confusion engendered by the Railroad surrounding this essentially simple point must be dispelled once and for all. This lawsuit began when the Railroad sought to enjoin a strike called as a consequence of its refusal to bargain concerning a Section 6 notice served by the Union seeking to amend their existing collective bargaining agreement.* By shifting the discussion to a distinctly collateral agreement—the so-called moratorium clause of the National Mediation Agreement of November 1, 1956 (Art. VI, R. 263, 268-69), the Railroad attempts to convert the dispute into a minor dispute. The National Agreement was an industry-wide one, the purpose of which was to fix the general level of compensation for the duration of the period covered. The parties therefore agreed that during that period they would not serve Section 6 notices for the purpose of increasing or decreasing rates of pay, overtime payments, Sunday or holiday payments, medical benefits, and the like.** But paragraph (e) of Article VI provided:

"This Article VI does not prevent the progressing of pending notices, the serving of notices and the nego-

* The District Court held: "The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agreement on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on the plaintiff on December 23, 1957." (Find. 19, R. 357.) This finding of fact has not been challenged. (Resp. brief, p. 17, n. 1.)

** The moratorium period has now expired. The relevant provision of the National Agreement is: "This Agreement *** shall remain in effect until October 31, 1959 and thereafter until changed or modified *** except that notices may be served before the expiration of the three-year period, provided such notices do not contemplate effective dates earlier than November 1, 1959." (Art. VIII, R. 269.)

tiation of agreements dealing with stabilization of employment, separation allowances or other matters not prohibited by the foregoing provisions of this Article VI." (R. 269.)

There is, of course, a wide difference between (a) the major labor dispute involved in this case, growing out of the refusal of the Railroad to bargain concerning a proposed contract change, and (b) the disagreement between the Railroad and the Union as to the applicability of Article VI. This case is in no sense one growing out of the difference concerning the applicability of Article VI. The attempt of the Railroad to characterize this case as one involving or growing out of a minor dispute depends for its success upon treating the major dispute, which is inescapably the genesis of the proposed strike and the litigation, as having been eliminated or absorbed by the disagreement as to the applicability of Article VI, and treating the latter as a grievance. The Railroad's purpose, of course, is to make it appear that the doctrine of the *Chicago River* case is applicable, and that this case would fall within an exception to the Norris-LaGuardia Act.

By its very nature, Article VI of the National Mediation Agreement is incapable of giving rise to grievances such as are referable to the Adjustment Board as minor disputes.*

* A minor dispute is one concerning the application or interpretation of a collective bargaining agreement—one which "contemplates the existence of a collective agreement already concluded, or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 723 (1945). Minor disputes are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 33 (1957). In the *Chicago River* case itself, there were involved "twenty-one grievances of members of the Brotherhood against the carrier. Nineteen of these were claims for additional compensation, one was a claim for reinstatement to a higher position, and one was for reinstatement in the employ of the carrier." 353 U. S., at 32. Minor disputes con-

It does not deal with terms and conditions of employment. It creates no rights in the employees against the employer. It simply regulates the subjects which the parties agree not to reopen during the life of the contract, and can serve only as an argument against the filing of certain Section 6 notices. Thus the only disputes it can give rise to are of necessity collateral issues in major disputes.

We propose to show (1) that the Railroad's contention that the Section 6 notice was barred by Article VI was a belated and opportunistic expedient; (2) that the contention that the Section 6 notice was barred by Article VI is without substance; (3) that the Railroad has not followed the procedure prescribed by law and by agreement of the parties for the resolution of questions of interpretation of the National Agreement; (4) that the question of interpretation has not been docketed, and is not pending for determination by the National Adjustment Board; and (5) that, even assuming that the Section 6 notice was barred by Article VI of the National Agreement, the fact remains that this lawsuit is one involving or growing out of a major labor dispute within the meaning of the Railway Labor Act and the Norris-Laguardia Act.

When the Section 6 notice was served, the Railroad did not object that it was barred by Article VI. At no time during the period from December 23, 1957, when the Section 6 notice was served, through August 20, 1958, when the temporary restraining order was issued, did the Railroad make any reference to Article VI, either in its correspondence with the Union and the National Mediation Board, or in the various meetings with the National Medi-

cern grievances—complaints by the Union on behalf of individual employees or groups of employees, or by the individual employees concerning their rights under the bargaining agreement. They are disputes of a type for which compulsory arbitration is deemed appropriate, and for the settlement of which compulsory arbitration is the procedure prescribed by law.

ation Board, or in any of the discussions between Railroad and Union officials. On August 21, 1958, *the day after the temporary restraining order had been issued*, the Railroad wrote to the Union, asserting for the first time that the Section 6 notice was barred by Article VI. (Finding 13, R. 355.) The reason for this belated and opportunistic maneuver is not difficult to trace. In his argument on the application for the temporary restraining order counsel for the Railroad had argued that the dispute between the parties concerned only grievances of station agents in connection with the Central Agency Plan, and relied on the *Chicago River* case as removing such grievances from the ban of the Norris-LaGuardia Act. Counsel for the Union replied that even if the dispute could be regarded as a minor one, an important prerequisite to the applicability of the *Chicago River* doctrine was lacking: the matter had not been referred to the Adjustment Board. *Manion v. Kansas City Terminal Ry. Co.*, 353 U. S. 927 (1957). Plainly the Railroad felt that it must initiate some sort of proceeding before the Adjustment Board, and in desperation attempted to submit, not any question of grievance in connection with the Station Agency Plan, but the wholly different, peripheral and novel question of the interpretation of Article VI as to the propriety of the Section 6 notice. This was done abruptly, without any prior discussion with or notice to the Union. At the same time the Railroad amended its complaint, setting forth these new developments. On cross-examination Mr. Heineman, chairman of the railroad, testified:

"I do not believe that the carrier, at any time before the commencement of this lawsuit, asserted to the Order of Railroad Telegraphers that the proposal of December, 1957 was contrary to Article VI of the November 1, 1956, agreement." (R. 106.)

This without more should suffice to demonstrate that this case is not one concerning grievances, or a minor dispute concerning questions of interpretation relating to rates of pay, rules and working conditions. Since the issue has been so confused by respondent, however, we go farther.

The contention that the Section 6 notice was served in violation of Article VI, or even that there is a substantial question as to the interpretation of Article VI with respect to this notice, is without substance. The National Mediation Board, which as we shall show is the authority charged with interpreting the National Agreement, has issued an interpretation with reference to a group of Section 6 notices, one of which was identical with the notice served in this case, declaring:

"The portion of paragraph (e) reading: 'This Article VI does not prevent the progressing of pending notices, the serving of notices and the negotiation of agreements dealing with stabilization of employment ***' permits the serving and progression of notices dealing with stabilization of employment. By being stated in a double negative form, it becomes an affirmative declaration of a right to so serve and progress proper notices dealing with such matters."

It accordingly ruled that the unions could progress all the notices so served under paragraph (e) of Article VI. *In re Applications of Brotherhood of Maintenance of Way Employees, Order of Railroad Telegraphers, and Employes' National Conference Committee for Interpretations*, Interpretations Nos. 72, 72(a), 72(b), National Mediation Board, January 14, 1959 p. 7.

Moreover, the Railroad completely disregarded the procedures prescribed by law and by the agreement of the parties for the interpretation of the National Mediation Agreement. Section 5, Second, of the Railway Labor Act provides:

"In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

The parties to the National Mediation Agreement reached a further understanding as to the procedure for interpretation:

"The Carriers' Conference Committees and the Employees' National Conference Committee have entered into an understanding that controversies over the meaning or application of the November 1, 1956 Agreement which are not settled on the individual properties will be referred to the Committees signatory to the Agreement for disposition

"The understanding contemplates that if the Committees signatory to the Agreement are unable to resolve the question, such committees will then endeavor to agree upon a method for final disposition of the dispute. If the Committees can neither resolve the question, nor agree upon a method for final disposition, it has been agreed that Section 5, Second, of the Railway Labor Act will then be invoked." (R. 343-44.)

When the Railroad decided, after the temporary restraining order had been issued, to interject the contention that the case concerned a question of interpretation of Article VI of the National Mediation Agreement, it did not make an attempt to resolve that question on the individual property. It did not submit the question to the signatory committees in accordance with the understanding to which it was a party. It did not submit the question to the National Mediation Board at all. Instead, it purported to refer that question to the Adjustment Board, which has no jurisdiction.

tion in the premises. A difference as to the interpretation of Article VI cannot possibly be brought within the terms of Section 3, First (i) of the Railway Labor Act.* Article VI of the National Agreement does not relate to rates of pay, rules, or working conditions, and a difference as to its interpretation cannot give rise to a grievance. Section 3, First, of the Railway Labor Act is the basis for this Court's holding in the *Chicago River* case that minor disputes are subject to compulsory arbitration and that strikes in connection with them are removed from the ban of the Norris-LaGuardia Act. It should be abundantly clear that the question whether the Section 6 notice in this case was served in violation of Article VI has nothing to do with grievances, nor with interpretation of provisions relating to rates of pay, rules, and working conditions, and that the Adjustment Board has no jurisdiction.

Even if the procedure prescribed by Section 3, First (i) were applicable the Railroad did not follow it. There was no attempt whatever to "handle the dispute in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." There was no attempt to "reach an adjustment in this manner." (If it is difficult to see how these procedures apply to the disagreement over the interpretation of Article VI, that is because they were, of course, designed for employee grievances, and not for such totally different questions of inter-

* Section 3, First (i) of the Railway Labor Act provides: "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (45 U. S. C. § 153, First (i).)

pretation.) In testimony which has already been quoted in part, Mr. Heineman stated:

"I do not believe that the carrier at any time before the commencement of this lawsuit asserted to the Order of Railroad Telegraphers that the proposal of December, 1957, was contrary to Article VI of the November 1, 1956, agreement." (R. 106.) " * * * I believe I am familiar with the procedural requirements for the submission of disputes to a National Railroad Adjustment Board. I am familiar with the requirement of the statute that disputes referable to the Board shall be handled on the property in the regular manner up to and including the highest operating officer of the carrier.

"As to whether the dispute as to the applicability of Article VI of the 1956 Agreement to the December, 1957, proposal was ever so handled on the property, it is the position of the carrier that the communication of August 21 to the General Chairman, with copies to Mr. Leighty, was the statement of the position of the carrier with reference to that dispute before it left the property * * *." (R. 107.)

In other words, the dispute was not handled on the property at all. On the day after the temporary restraining order was issued, the Railroad simply invented the dispute and referred it immediately to the Board.* The simple

* Mr. Heineman conceded that "this may have been unusual in the lateness of the assertion of that position to the Telegraphers" (R. 107) and complained in justification that the strike notice was also "unusual." (R. 108.) But there is a vast difference between the procedure followed by the Union in calling the strike and that of the Railroad in referring this so-called "dispute" to the Adjustment Board. Before issuing the strike notice the Union had exhausted the processes of the Railway Labor Act. The process took many months and the Railroad was apprised of every step. The strike ballot was submitted to the Union membership on July 10, 1958, almost seven months after service of the Section 6 notice. The Railroad was aware that the ballot was being taken. (R. 95.) The strike call was not issued until August 18, more than five weeks after the ballot. In these circumstances it cannot be seriously maintained that the strike call came as a surprise to the Railroad, nor that it was an "unusual" action.

truth is that the Railroad made no effort to comply with the procedure for referring a dispute to the Adjustment Board, and offered no adequate explanation for its failure to do so.

Since the disagreement over the interpretation of Article VI is not the labor dispute which gave rise to this lawsuit, and since the National Mediation Board is the proper agency to which such disagreements should be referred, and the Adjustment Board is not, and since the Railroad did not follow the procedure for submitting disputes to the Adjustment Board in any event, the Railroad's current statement that the question of interpretation of the moratorium clause has been "formally submitted * * * to the Adjustment Board, which has received and docketed the submission and where the issue is pending for determination" (Resp. brief, p. 65), is meaningless as well as irrelevant.*

Finally, even if we assume, of course without conceding, that the Section 6 notice was served contrary to Article VI, that circumstance would not alter the fact that the present action is one involving or growing out of a major labor dispute. This Court can put a quick end to the constant shifting from one issue to another by asking the Railroad to answer forthrightly one simple question: Is the Railroad prepared to maintain that the issue between it and this Union, precipitated by the service of the

* It is also untrue in an important part. Long ago, at the trial in the District Court, Mr. Heineman corrected a statement he had made to the effect that the matter had been docketed: "I have been informed that that case was received and docketed by the Third Division. I may have been in error. I think my testimony went beyond the submission of the matter to the Adjustment Board. I believe I stated that we had received a letter indicating that it had been received. I think Exhibit 12 is the letter I was referring to. It does not refer to docketing." (R. 108, Exhibit 12, see R. 301.) As of this writing, to our knowledge, the matter has not been docketed and remains in the same posture as it was when the attempt to refer it to the Adjustment Board was first made.

Section 6 notice, as to whether the collective bargaining agreement between them shall be amended so as to provide that no position in existence on December 3, 1957 shall be abolished or discontinued except by agreement, is an issue for the settlement of which the law provides compulsory arbitration? If the answer is in the negative, the Railroad cannot possibly maintain that this action arises out of a minor dispute within the holding of the *Chicago River case*.

IV.

NONE OF THE QUESTIONS RAISED BY THE PETITION FOR CERTIORARI IS MOOT.

The questions concerning the jurisdiction of the District Court to enter an injunction pending appeal under the supposed authority of Rule 62(c), Federal Rules of Civil Procedure, and whether the Railway Labor Act withdraws the right to strike following termination of emergency services of the National Mediation Board, are not moot. The periods during which the temporary injunctive orders of the District Court were operative have expired. However, the Railroad was required to post, and did post, bonds as security both in connection with the temporary restraining order (which was issued on the theory that the Act withdraws the right to strike during a second thirty-day waiting period following termination of emergency mediation services) and in connection with the injunction pending appeal. The rights and duties of the parties arising out of the bonds are dependent upon whether the injunctive orders were properly issued.

Unlike *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, A.F.L.-CIO, et al. v. Missouri*, recently decided in this Court (28 L. W. 4095, Jan. 25, 1960) the labor dispute here involved has not been settled, no constitutional issue is at stake inhibiting decision by this Court, and affirmative relief on the bonds may be given against the Railroad in this proceeding. (Section 7, Norris-LaGuardia Act, 29 U. S. C. § 107.) The orders appealed from come within this Court's observation in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 515 (1911), that consideration of the validity of orders in suit "ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review." The recurring character of one of

the problems, the claimed second thirty-day period, is highlighted by the concern of the National Mediation Board (Memorandum, National Mediation Board, p. 7) and by *Pittsburgh & Lake Erie R. R. v. Brotherhood of Railroad Trainmen*, 45 L. R. R. M. 2313, 28 L. W. 2322 (W. D. Pa. December 14, 1959), which rejected the notion of a second thirty-day waiting period. This case was not decided until after our brief on the merits was filed. It is squarely in conflict on this issue with the decision of the District Court in the instant case, which was left undisturbed by the Court of Appeals. The appeal in the *Pittsburgh* case was dismissed on motion of both parties, prior to the expiration of the second thirty-day period, on December 30, 1959.

V.

EVEN APART FROM THE NORRIS-LAGUARDIA ACT, THE DISTRICT COURT LACKED JURISDICTION.

The Railroad's argument as to the existence of federal-question jurisdiction reduces to the proposition that the Railroad can create jurisdiction by asserting its existence. The Railroad points to no federally based right to the injunction which it seeks in this case.

At best, the Railroad's current position is that its right to an injunction derives from the action of some state commissions which the national government has allowed to act in this area of regulation of interstate commerce. The inadequacy of the argument on the merits has already been established. Even if the argument had merit, however, it would only serve to bring the case squarely within the holding of this Court in *Gully v. First National Bank*, 299 U. S. 109 (1936), that no federal question is, thus presented. There, too, the right asserted was based on State law which controlled only because Congress had permitted the State to act. This delegation, or withholding, of federal power, cannot give rise to federal-question jurisdiction:

"We recur to the test announced in *Puerto Rico v. Russell & Co.*, 288 U. S. 476, 483 * * *: 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nash-*

ville R. Co. v. Mottley, supra. With no greater reason can it be said to arise thereunder because permitted thereby." 299 U. S. at 116.

There is no basis for the assertion of federal jurisdiction in this case. The Railroad has shown no federal law which authorizes the issuance of the injunction. And we repeat that this Court, in *Trainmen v. Chicago River & Indiana R. R.*, 353 U. S. 30 (1957), was not asked to pass on this question of federal jurisdiction, nor did it purport to do so.

CONCLUSION.

The Railroad dwells at length on the damages that would befall it and the public if a strike took place. We do not doubt the Railroad would suffer adverse consequences. As to the Railroad's claims of the "seriousness of interruption to interstate commerce, and the consequent adverse effect on the public" (Resp. brief, p. 2) the Railway Labor Act places responsibility in this area upon the Mediation Board and the President and not upon the courts (Section 10, Railway Labor Act, 45 U. S. C. § 160), and they did not choose to act in advance of the strike date. Nor do we quarrel with the proposition quoted on pages 61 and 62 of the Respondent's brief that "*Congress* at different times and for different purposes may gauge the demands of 'prevailing economic conditions' differently or with reference to considerations outside merely 'economic conditions'." (Emphasis added.) But we submit that until Congress has acted, neither the courts nor the Railroad can destroy the protections afforded by the Norris-LaGuardia Act.

Respectfully submitted,

ALEX ELSON,
LESTER P. SCHORER,
1625 K Street, N. W.,
Washington 6, D. C.
Attorneys for Petitioners.

BRAINERD CURRIE,
PHILIP B. KURLAND,
AARON S. WOLFF,
Of Counsel.

February 15, 1960.

SUPREME COURT, U. S.

U.S. SUPREME COURT, U.S.

FILED

MAY 2 1960

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 100

THE ORDER OF RAILROAD TELEGRAPHERS,

A VOLUNTARY ASSOCIATION, ET AL.,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY

COMPANY, A CORPORATION,

Respondent.

PETITION FOR REHEARING.

CARL McGOWAN,

JORDAN JAY HILLMAN,

400 West Madison Street,

Chicago 6, Illinois,

Attorneys for Respondent.

EDGAR VANNEMAN, JR.,

ROBERT W. RUSSELL,

Of Counsel.

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CHICAGO AND NORTH WESTERN RAILWAY
COMPANY, A CORPORATION,

Respondent.

PETITION FOR REHEARING.

North Western, pursuant to Rule 58, hereby petitions
for rehearing of this Court's decision of April 18, 1960.

I.

The opinion of the Court says that the "main question in this case" is whether the Norris-LaGuardia Act bars an injunction; and then promptly purports to find the answer within the four corners of that statute. It concludes that "(U)less the literal language of (Norris-LaGuardia) is to be ignored, it squarely covers this controversy." But, as pointed out by an objective source, "(T)he plain language of Norris-LaGuardia is generally violated if a labor injunction is issued. . . ." And yet this Court has repeatedly upheld injunctions, the literal

prohibitions of Norris-LaGuardia notwithstanding, in those cases where the Court has found a "repugnance of the union objectives to a federal policy implied from judicial construction of the Railway Labor Act." Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958).

Whether or not Norris-LaGuardia applies is, accordingly, a description of the result of the decisional process in this case, and not of "the main question" to be decided. North Western has freely conceded in every court throughout this litigation that, if the contract demand made by the ORT was to be deemed a proper one under the Railway Labor Act, then Norris-LaGuardia clearly applied. The true question in the case is, thus, whether the union demand is within the range of congressional contemplation under the Railway Labor Act. That question can be answered only by looking to the words of the Railway Labor Act, construed in the light of any relevant keys to the congressional intent underlying them. Summarily to dispose of this case by reference to Norris-LaGuardia is so patent a misapprehension of the issue here as to warrant this request for reconsideration.

The opinion of the Court nowhere expressly rejects—and, indeed, it appears to recognize—that an unauthorized demand under the Railway Labor Act cannot be made the basis of a strike free of judicial interdiction under Norris-LaGuardia. It could not do otherwise without now taking the position that the union demand in the *Howard* case that the railroad, on pain of strike, enter into a contract abolishing a classification of jobs held by Negroes not represented by the union, was a proper one. North Western does not understand that the Court now so intends to hold.

Justice Black also wrote for the Court in *Howard*. There he disposed of Norris-LaGuardia in an almost parenthetical aside. Here he characterizes it as "the main question"

and looks to its literal terms as the guide for decision. Distinguishable as the facts in the two cases may be, why this difference in method? Perhaps the explanation is to be found in the statement in the Court's opinion that "(I)t would stretch credulity too far to say that the Railway Labor Act, *designed to protect railroad workers*, was somehow violated by the union acting precisely in accordance with *that act's purpose to obtain stability and permanence in employment for workers.*"*

The primary purpose and design of Congress in the Railway Labor Act has, however, previously been identified by this Court in somewhat different terms:

"It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured . . ." *Virginian Ry. Co. v. System Federation* No. 40, 300 U. S. 515, 553 (1937).

Indeed, in expressing its purposes at the very outset of Section 2 of the Act, Congress said:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . ."

To suggest at this late date that the Railway Labor Act has no purpose other than to further the interests of one private segment of our economy is to pervert the meaning of this statute and heedlessly to invite the very disruption of commerce which Congress sought to avoid. That the so-called "labor" statutes are not passed by Congress solely for the benefit of labor unions was recognized by Mr. Justice Harlan, writing for the Court one week after this case was decided;

" . . . It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails

*Emphasis is supplied throughout.

the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy' of the Act is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. It may be asserted, without fear or contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in 'industrial peace which it is the over-all purpose of the Act to secure.' *Labor Board v. Childs Co.*, 195 F. 2d 617, 621-622 (concurring opinion of L. Hand, J.) * * * *

Local Lodge No. 1424 v. NLRB, No. 44, October Term, 1959, decided April 25, 1960.

The question thus remains: Was the ORT's demand for a veto power, on this record, within the range of congressional authorization under Section 6 of the Railway Labor Act? Although it had already reached decision by reference to Norris-LaGuardia, the Court does eventually say that it thinks this demand to be a proper one. It seems to accomplish this, however, by the device of characterizing the demand as something other than it really was. For example, Justice Black says that he can find nothing which has the effect of "making it unlawful for unions *to want to discuss* with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs." In almost the next breath, he says "(T)he union *merely asked for a contractual right to bargain* with the railroad about any voluntary steps it might take to abandon stations or to seek permission to abandon stations and thus abolish jobs." And he concludes this unrealistic description of the demand by the statement that "(N)othing the union requested would require the railroad to violate any valid law or the valid order of any public agency."

The Court thus refuses to accept the ORT demand for what it was, namely, an unqualified veto power over the discontinuance of positions. The ORT was expressly not seeking simply the opportunity of discussing or consulting with North Western about job discontinuances, nor was it interested in simply a contractual right to bargain about them. It was seeking a veto; and, in response to questions from the bench during oral argument, counsel for the ORT made it clear that the veto power sought through contract would, in the opinion and purpose of the ORT, prevail as against valid regulatory orders necessitating job discontinuances in the public interest.

The Court, noting this contention of the ORT, says that "(W)hether this contention is valid or not we need not decide since there is no such conflict before us." The question is not whether that conflict is now actually before the Court. That kind of conflict could only arise *after* a railroad has been forced on pain of strike to enter into a contract of the kind here demanded by the ORT. The question is, rather, whether Congress intended that a railroad could legally be called upon to enter into such a contract, with the potential it clearly possesses for frustration of the regulatory process. In gauging the intention of Congress in this regard, the Court should at least characterize the demand accurately, for obviously the exact nature, purpose and effect of the demand, especially in relation to the regulatory process, would be critical elements in congressional appraisal of it. How, therefore, can the Court say that it need not express an opinion on this question, if it is to make a determination of congressional intent which is at all meaningful?

Moreover, the question is directly presented here and now. If the North Western were to acquiesce under strike pressure in the ORT's demand—what then? Could and should it, as a matter of open and forthright dealing with its em-

ployees, agree on one day to a contract saying that no position in existence on December 3, 1957 will be abolished or discontinued except by agreement with the union, and then say the next day that its agreement is unlawful and does not apply to ORT members expressly covered by regulatory orders!

The range of congressional contemplation of the scope of bargaining under the Railway Labor Act has, as this Court has repeatedly recognized, lines of demarcation which turn on such things as a generalized repugnance to public policy of efforts by a union, as in the *Howard* case, to get jobs for their own members which were held by Negroes. North Western asserts a like repugnance in this effort by the ORT to substitute itself for the duly constituted regulatory agencies in the determination of the public interest. The answer to this question is not, any more than in *Howard*, to be found in the Norris-LaGuardia Act, but in the Railway Labor Act, construed in the light of other congressional enactments with respect to interstate transportation relevant to the ascertainment of congressional intent. This is a rigorous and difficult process at best. It is not helped by the curious aversion the Court's opinion has for accurate characterization of the ORT's demand.

Equally curious is the Court's statement that "(I)t is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large." This statement is the capstone of a discussion of protective conditions and other devices designed to cushion the economic impact upon the individual of a job discontinuance found to be in the public interest. The inference is that North Western has made this archaic argument. This is an unfair inference from a record which showed a persist-

ent, albeit unsuccessful, effort by North Western to interest the ORT leadership in plans to provide for displaced employees. The only "collective voice" which has been silenced is that of the public, speaking through the regulatory process.

II.

A second reason for rehearing relates to the use made by the Court of the findings of fact by the District Court, the precise nature and significance of which the Court seems to have mistaken.* In the Court of Appeals, the ORT's brief there asserted that North Western's failure to attack the findings was dispositive of the appeal. In its reply brief, North Western dealt with each of the findings of fact. It pointed out that, of the 21 findings in all, Findings 1 through 16 were acceptable. Then North Western dealt in detail with the five remaining findings, two of which are now referred to in the opinion of the Court as of significance with reference to the decision reached.

The Court says "... * * in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that 'collective bargaining as to the length or term of employment is commonplace,' is not challenged." The finding referred to is only a part of Finding 17, which reads in whole as follows:

"17. The proposed contract change incorporated in the Section 6 notice served by the defendant Telegraphers on December 23, 1957 relates to the length or term of employment as well as stabilization of employment. Collective bargaining as to the length or term of employment is commonplace. There are a

* After the oral argument, counsel joined in supplying to the Court (a) North Western's proposed findings of fact, (b) the transcript of the proceedings at the time the District Court made its findings, and (c) the briefs in the Court of Appeals.

variety of collective bargaining provisions in the railroad industry relating to stabilization of employment as such, including provisions for severance allowance, supplementary unemployment compensation benefits and guaranteed employment. The latter provision in one instance goes back more than thirty years. Contract provisions substantially identical to the rule proposed by the defendant Telegraphers are in existence on at least two railroads."

In the Court of Appeals, North Western noted that it had excepted to this finding as conclusory in character, especially insofar as the first two sentences are equated with a demand for a veto power over the discontinuance of jobs. The third and fourth sentences are unexceptionable, of course. North Western excepted vigorously to the last sentence, because the contracts introduced into the record, upon which this sentence was based, were not, "substantially identical" with the veto power here demanded. In its brief in this Court, North Western noted that this alleged finding of fact, as distinct from the legal or otherwise conclusory findings contained under the label of findings of fact, was the only one that was inherently untrue. It is clear, therefore, that North Western has not left unchallenged any so-called finding of fact which purports to find that a veto power over job discontinuances is a commonplace aspect of present-day bargaining, either in the railroad industry or elsewhere. Neither in the record, nor in its 60-page foray outside the record, was the ORT able to come up with a single example of a comparable veto power. If the Court in terms assumes something to be commonplace which actually is novel in the extreme, surely reconsideration is in order.

The other finding which the Court weaves into its argument is Finding 19:

"19. The dispute giving rise to the proposed strike grows out of the failure of the parties to reach agree-

ment on the proposed contract change incorporated in the Section 6 notice served by defendant Telegraphers on the plaintiff on December 23, 1957.”

This finding was excepted to by North Western but, taken on its face, it simply says that, if the ORT had not made this demand, there would have been no proposed strike. It concludes nothing on—indeed, it simply poses—the issue of whether the proposed demand was a proper one under the Railway Labor Act.

In conjunction with its reference to this finding, the Court appears to attribute significance to the rejection by the District Court of North Western’s proposed finding that the ORT’s demand was directed in purpose and effect against the implementation of the Central Agency Plan pursuant to regulatory authority. But, as the transcript submitted after argument shows, the District Judge rejected North Western’s findings not because he found them untrue or unsupported by evidence, but only because he deemed them irrelevant or immaterial to his theory of the case.

CONCLUSION.

Rehearing of the decision of April 18, 1960, should be granted.

Respectfully submitted;

CARL McGOWAN,
JORDAN JAY HILLMAN,

400 West Madison Street,
Chicago 6, Illinois,
Attorneys for Respondent.

EDGAR VANNEMAN, JR.,
ROBERT W. RUSSELL,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing
is presented in good faith and not for delay.

.....
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

THE ORDER OF RAILROAD TELEGRAPHERS, et al.,
Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY
COMPANY,

Respondent.

On Writ of Certiorari to the
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MOTION OF BUREAU OF INFORMATION OF THE
EASTERN RAILWAYS, THE ASSOCIATION OF
WESTERN RAILWAYS, AND BUREAU OF INFOR-
MATION OF THE SOUTHEASTERN RAILWAYS FOR
LEAVE TO FILE BRIEF IN SUPPORT OF PETITION
FOR REHEARING

HOWARD NEFFNER,
WALTER J. CUMMINS, Jr.,
WILLIAM M. McGOWAN, Jr.,
11 South La Salle Street,
Chicago 3, Illinois

Attorneys for Bureau of Information of
the Eastern Railways, The Association
of Western Railways, and Bureau of In-
formation of the Southeastern Railways.

SIMPLY, AUSTIN, BURMAN & SMITH,
Of Counsel

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FOR REHEARING

The Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways move this Court for leave to file the attached brief as *amici curiae* in support of the petition for rehearing. Although both parties consented to the filing of a brief on the merits by these *amici*, and although the Railway Labor Executives' Association filed briefs both on the merits and in support of the petition for certiorari in this cause, petitioners refused to consent to the filing of the present brief. The interest of

the *amici* Bureaus in the questions raised by this case was set forth in their brief on the merits at pages 2-3. The far-reaching implications of the majority's opinion rendered on April 18, 1960, raise additional issues as to the application of the National Transportation Policy by state and federal regulatory commissions and as to the relationship between public regulation and collective bargaining in the transportation industry.

The majority opinion poses questions of vital importance not only to respondent but also to the railroads represented by these *amici*. It is in the public interest to maintain industrial peace in the transportation field. Yet the opinion herein, unless modified, will foster a rash of extreme demands that will breed strikes financed by all the railroads under the Railroad Unemployment Insurance Account.

For the reasons expressed herein and in the brief on the merits of these Bureaus, this motion for leave to file a brief *amici curiae* in support of respondent's petition for rehearing should be granted.

Respectfully submitted,

HOWARD NEITZERT,

WALTER J. CUMMINGS, JR.,

WILLIAM M. McGOVERN, JR.,

*Attorneys for Bureau of Information of
the Eastern Railways, The Association
of Western Railways, and Bureau of In-
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BRIEF IN SUPPORT OF PETITION FOR REHEARING

It would appear from the opinion in this case that the Court misconceived the purpose and effect of the petitioners' demand. *Amici* Bureaus respectfully submit that the Court was in serious error in thinking that "The employment of many of these station agents inescapably hangs on the number of railroad stations that will either be completely abandoned or consolidated with other stations" (slip op. p. 6). The strike called by petitioners was not necessary to prevent loss of employment by any employee of the respondent. The petitioners' demand had to do with the abolition of *positions*, not with the "permanency" or "term of employment" of any of respondents' employees. The distinction is a crucial one. For example, in the pro-

posed merger between the Erie and the Delaware Lackawanna & Western Railroads, which is now pending before the Interstate Commerce Commission, the Railway Labor Executives' Association ("RLEA") has pointed out that although 1,982 positions will be abolished as a result of the merger, so many vacancies will be created by attrition that very few, if any, employees will be left without work to do. See Brief of RLEA (I.C.C. Finance Docket No. 20707, pp. 35-37, November 23, 1959.) In the present case the relationship between abolition of positions under the Central Agency Plan and loss of employment is comparably remote.

Moreover, respondent has offered to negotiate on the subject of lay-offs (R. 158), which alone controls the permanency or term of employment of employees represented by petitioners. If petitioners had been willing to negotiate on this subject pursuant to their duty to bargain about "rates of pay, rules, and working conditions", an agreement might have been reached curtailing any lay-offs as a result of the Central Agency Plan. Therefore, the Plan would not "necessarily result in loss of jobs for some of the station agents and telegraphers, members of the petitioner union" (slip op. p. 2). Under the Court's decision, on the other hand, railroad labor organizations can strike not only to prevent employees who are working 12 minutes a day from being discharged, but they also can insist that such employees be kept in the same positions and that when they die the carrier must find others to do the same job in perpetuity!

Even if a carrier must bargain about and suffer strikes over the abolition of positions as distinguished from the term of employment of employees, does this principle apply when the positions involved are affected with a public interest and their existence is subject to regulation by a

public agency? The majority opinion intimates that respondent's refusal to bargain was wrong because it was not limited to agents' positions in states where the Central Agency Plan had been approved (note 16, slip op. p. 10). Contrary to the opinion below, the majority apparently assumes that the petitioners' demand was not inspired by the state commission proceedings (slip op. p. 11). But whatever the motives, petitioners' demand was certainly not limited to positions other than those involved in the state-approved Plan. Did the Court mean that the North Western can refuse to bargain over the positions at issue in the state commission proceedings provided that it negotiates over the abolition of other positions? A clarification of the Court's holding is necessary not only to guide the parties to this dispute in their bargaining upon remand but also for the entire transportation industry. The Court's decision has already inspired labor organizations to submit similar demands on other carriers, and *amici curiae* anticipate a flood of such demands in the near future.

In this connection, *amici curiae* agree that "fair terms and conditions of railroad employment are essential to a well-functioning transportation system" (slip op. pp. 6-7) which the national transportation policy seeks to achieve. But the interests of employees constitute only one of the factors to be considered under that policy. For example, in passing on applications for mergers the "interest of the carrier employees affected" is just one of the four considerations the Interstate Commerce Commission must weigh under Section 5(2)(c) of the Interstate Commerce Act (49 USC §5(2)(c)). In *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, this Court just a few months ago held that the Commission should not give single-minded consideration to the antitrust policies of Congress but rather "the problem is one of accommodation" which will

"assist in effectuating the over-all transportation policy." 361 U.S. at p. 186. Did the Court in the present case mean to hold that when employees' interests are involved, the Commission's task is not one of accommodation but rather a single-minded adherence to the interests of labor? The RLEA has so construed the Court's opinion, for they have already seized upon it as support for the job freeze they seek to have the Commission impose in the Erie merger. See RLEA Exceptions to the Recommended Report and Order of Examiner Hyman J. Blond (I.C.C. Finance Docket No. 20707, pp. 5-7, April 26, 1960). In any event, any accommodation of competing interests by the Commission is altogether meaningless if labor organizations acting exclusively in the interest of their members are free to veto mergers or abandonments which have been considered and approved by a public agency. One of the factors weighed by the Commission in the *Minneapolis & St. Louis* case was the effect of the various applications on employees. 361 U.S. at p. 193. If the Commission had concluded that the other statutory considerations necessitated approval of the Minneapolis & St. Louis Railroad's application despite the adverse effect on employees, could the employees of the Toledo, Peoria and Western have called a strike to force the carrier to accept the application of the Santa Fe and Pennsylvania?

Even if the "interest of the carrier employees" were the only relevant consideration under the National Transportation Policy, the ultimate determination (1) whether a consolidation or abandonment should be approved and (2) what conditions on the approval should be imposed to protect employees, rests with a public agency rather than with labor organizations or carriers. Sections 5(2)(c) and (f) of the Interstate Commerce Act and *Interstate Commerce Commission v. Railway Labor Executives' Associa-*

tion, 315 U.S. 373, cited by the Court, do not support its statement that "the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which railroads may or must negotiate and bargain collectively" (slip op. p. 8). The cited examples in fact *narrowed* the scope of collective bargaining unless the Court meant to hold that a carrier may or must bargain collectively over conditions imposed by the Interstate Commerce Commission for the protection of employees affected by an abandonment or consolidation. The 1936 Washington Agreement providing severance pay for displaced employees which the Court also cites as an example of collective bargaining has been largely superseded by the Commission's practice of ordering carriers to give greater benefits to employees than those provided by the agreement. Carriers have heretofore assumed that they (and their employees) could be compelled to accept the conditions imposed by the Commission without further bargaining on the matter. If, however, disagreements over the effectuation of consolidations and abandonments or over employees' protective conditions constitute "labor disputes" under the Norris-La Guardia Act, it would seem that Commission orders on the subject are no longer enforceable. The Norris-La Guardia Act was not intended as a "one-way" street, and it limits injunctions against employers as well as employees in disputes to which it applies. See S. Rep. No. 163, 72nd Cong., 1st sess., p. 19 (1932). *Amici curiae* believe that the opening of abandonments and consolidations to unrestrained economic warfare is contrary to Congress' intention that they should be regulated in the public interest, and will lead to frequent disruptions to transportation contrary to the stated purpose of the Railway Labor Act and to the past practice of labor and management to let these issues be resolved by the appropriate agency.

Amici curiae of course recognize that "added railroad expenditures for employees cannot always be classified as 'wasteful'" (slip op. p. 12). But this Court is not called upon to decide whether or not the increased expenditures necessitated by petitioners' demand would be "wasteful." That issue has already been decided by the state regulatory commissions entrusted with jurisdiction over station agencies by Congress. *Amici curiae* contend only that these commissions rather than the Order of Railroad Telegraphers constitute the appropriate forum for resolving the issue. Alternatively, if the Telegraphers are given the power to decide whether or not station agencies should be abandoned, they have an obligation to consider the general public as well as the interests of the employees they represent. *Brotherhood of Trainmen v. Howard*, 343 U.S. 768. The record shows that they did not do so in the present case.

In conclusion, a rehearing should be granted because the majority misunderstood the effect and purpose of the petitioners' demand. A clarification of the Court's opinion on the proper relationship between collective bargaining and public regulation of the transportation industry is also necessary. The importance of the issues involved in this case to labor and management and public agencies is shown by the appearance of numerous organizations, as *amici curiae*. The public concern is also demonstrated by the widespread adverse editorial comment that the decision has evoked. The result reached should be reconsidered upon reargument. Cf. *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

HOWARD NEITZERT,

WALTER J. CUMMINGS, JR.,

WILLIAM M. McGOVERN, JR.,

*Attorneys for Bureau of Information of
the Eastern Railways, The Association
of Western Railways, and Bureau of In-
formation of the Southeastern Railways.*

SIDLEY, AUSTIN, BURGESS & SMITH,

Of Counsel.



May 1960.